

No. 2639

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)


PABST BREWING COMPANY, a Corporation,
Plaintiff in Error,
vs.

E. CLEMENS HORST COMPANY, a Corporation,
Defendant in Error.

VOLUME I.
Pages 1 to 256, Inclusive.)

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the Superior Court of the County of Sacramento,
State of California.*

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Complaint.

The plaintiff in the above-entitled action complains of the defendant herein and for cause of action alleges:

1. Plaintiff now is and during all the times mentioned was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New Jersey and doing business as such corporation in the State of California.

2. Defendant now is and during all the times mentioned was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Wisconsin but doing business as such corporation in the State of California.

3. In the month of August, 1911, and by virtue of certain contracts in writing made and entered into between plaintiff and defendant for the price of twenty cents (\$0.20) per pound, F. O. B. cars in the State of California, plaintiff agreed to sell and deliver to defendant and defendant agreed to purchase, pay for and receive from plaintiff two thousand (2,000) Bales of Cosumnes hops to be grown in the State of California during the year 1912, containing

in the aggregate approximately two hundred (200) tons of hops aforesaid; delivery of said hops to be made after the curing of said crop of 1912 and prior to the first day of March, 1913.

4. That thereafter, in the year 1912, plaintiff did procure said two thousand bales of Cosumnes hops of the said crop of 1912 in accordance with the terms and provisions of said contract and agreement with defendant, and in full the provisions thereof did offer and did tender the same defendant. [1*]

That, however, defendant refused to accept, receive or pay for said hops or any thereof.

5. Plaintiff duly performed and offered to perform all the acts, conditions and things on its part to be performed in accordance with said contract and agreement for said sale of hops aforesaid but defendant neglected and refused to do or perform the conditions on its part to be performed as aforesaid.

6. By said failure and refusal on the part of defendant to accept, receive and pay for said hops as aforesaid plaintiff has been damaged in the sum of Thirty-two Thousand (\$32,000.00) Dollars.

WHEREFORE, plaintiff prays judgment of the Court against defendant in the sum of \$32,000.00 and costs of suit.

DEVLIN & DEVLIN and
W. H. CARLIN,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

E. Clemens Horst, being duly sworn, says that he

*Page-number appearing at foot of page of original certified Record.

is President of E. Clemens Horst Company, a Corporation, the Plaintiff in the above-entitled action; that he has read the above and foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters he believes it to be true.

E. CLEMENS HORST.

Subscribed and sworn to before me, this 1st day of June, 1913.

[Seal]

M. I. LAWRENCE,

Notary Public.

My commission expires January 27th. 1914. [2]

[Endorsed]: Indexed No. 17,402. Dept. ——. Dept. 3. In the Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Complaint. Filed Jun. 19, 1913. E. F. Pfund, Clerk. By H. W. Hall, Deputy. W. H. Carlin, and Devlin & Devlin, Ellis Block, Marysville, Cal., Attorneys for Plaintiff. [3]

Summons.

*In the Superior Court of the State of California, in
and for the County of Sacramento.*

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Action brought in the Superior Court of the State of California, in and for the County of Sacramento, and the Complaint filed in said County of Sacramento, in the office of the clerk of said Superior Court.

Sec. 407, C. C. P.

The People of the State of California, Send Greeting to Pabst Brewing Company, a Corporation, Defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Superior Court of the State of California, in and for the County of Sacramento, and to answer the complaint filed therein, within ten days after the service on you of this Summons, if served within this county, or, if served elsewhere, within thirty days.

And you are hereby notified that unless you so appear and answer the said Complaint as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint as arising upon contract, or will apply to the Court for any other relief demanded in the complaint.

Witness my hand and the seal of said Superior Court of the State of California, in and for the County of Sacramento this 19th day of June, 1913.

[Seal]

E. F. PFUND,

Clerk,

By H. W. Hall,

Deputy Clerk. [4]

Jun. 28, 1913,

State of California,
City and County of San Francisco,—ss.

Meurice Swim, being duly sworn, deposes and says: That he is, and was at the time of the service of the papers herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served the within Summons on the 28th day of June, A. D. 1913, on PABST BREWING COMPANY, a corporation, by delivering to and leaving with J. T. HARMES, personally —the designated agent of said PABST BREWING COMPANY, in the State of California, and the person upon whom service of process can be made for said PABST BREWING COMPANY, in the State of California —said Defendant therein named, personally, in the City and County of San Francisco, a copy of said Summons attached to a true and correct copy of the Complaint in the action therein named.

MEURICE SWIM.

Subscribed and sworn to before me, this 1st day of July, 1913.

[Seal]

D. B. RICHARDS,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: 17402. Dept. 3. Superior Court, County of Sacramento Department No. ——. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Original Summons. Filed Jul. 7, 1913. E. F. Pfund, Clerk. By H. W. Hall, Deputy. [5]

*In the Superior Court of the State of California in
and for the County of Sacramento.*

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Petition for Removal of Cause.

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco:

Pabst Brewing Company, a corporation, the defendant above-named, appearing specially solely for the purpose of presenting this petition, praying for the removal of the above-entitled cause as hereinafter set forth, presents this its petition and respectfully shows to the Court:

That the above-entitled action is a suit of a civil nature of which the District Court of the United States in and for the Northern District of California, Second Division, has original jurisdiction, and that the defendant desires to remove the said suit from the Superior Court of the State of California in and for the County of Sacramento, to the said District Court of the United States in and for the Northern District of California, Second Division;

That the said action was brought in and is now pending in the said Superior Court; [6]

That the time within which this defendant is re-

quired by the laws of the State of California or by any rule or rules of the said Superior Court to answer or plead to the complainant of the plaintiff herein has not elapsed or expired, and the matter in controversy in said suit exceeds, exclusive of interest and costs, the sum and value of Three Thousand (3000) Dollars;

That E. Clemens Horst Company, a corporation, plaintiff in the said suit, was at the time of the commencement of said suit and ever since has been and now is a corporation created, organized and existing under and pursuant to the laws of the State of New Jersey, and a resident and citizen of said State of New Jersey;

That the defendant Pabst Brewing Company, a corporation, the defendant in the above-entitled action, at the time of the commencement of said suit, was and ever since has been and now is a corporation created, organized and existing under the laws of the State of Wisconsin, having its principal place of business in said State of Wisconsin, domiciled and a resident in said last-mentioned State and a citizen thereof;

That your petitioner, the defendant above named, herewith presents its bond with American Surety Company of New York, as surety, in the sum of Five Hundred (500) Dollars, for this petitioner's entering in the said District Court, within thirty days from the date of filing this petition, a certified copy of the record in the above-entitled suit, and for this petitioner's paying all costs that may be awarded by the said District Court if said District Court shall hold

that such suit was wrongfully or improperly removed thereto, and also for this [7] petitioner's appearing and entering special bail in such suit, if special bail was originally requisite therein;

That said American Surety Company of New York, the surety named in and that executed the said bond, is a corporation created, organized and existing under the laws of the State of New York, and is duly authorized to execute the said bond in the State of California, and to execute bonds and undertakings as surety receivable in and by all the courts of the State of California and by the said District Court of the United States in and for the Northern District of California, Second Division;

That there are no other parties to the said suit except the said plaintiff and the said defendant;

That by reason of the premises this petitioner, the said defendant, desires and is entitled to have the said suit removed from said Superior Court of the State of California, in and for the County of Sacramento, into the District Court of the United States in and for the Northern District of California, Second Division;

That the said District Court of the United States, in and for the Northern District of California, Second Division, is the District Court of the United States for the proper District, being the District Court of the United States held in the district where said suit is pending;

WHEREFORE, your petitioner prays that this Court accept this petition and the said bond and proceed no further in the said suit, except to make an

order directing the removal of the said suit as required by law, and to order and direct a certified copy of the record herein to be made as provided [8] by law.

PABST BREWING COMPANY.

By FRANK H. POWERS,
Its Attorney in Fact,
Petitioner.

HELLER, POWERS & EHRMAN,

Attorneys for Petitioner and Defendant, Pabst
Brewing Company, Appearing Specially Solely
for the Purpose of Presenting This Petition
Praying for the Removal of the Above-entitled
Cause.

State of California,
City and County of San Francisco,—ss.

Frank H. Powers, being first duly sworn, deposes
and says:

That he is the attorney in fact for Pabst Brewing
Company, a corporation, defendant named as peti-
tioner in the above-entitled petition, and that he is
duly authorized by said Pabst Brewing Company, as
such attorney in fact, to sign this petition and the
bond therein referred to; that none of the officers of
said corporation reside in or are in the State of Cali-
fornia; that he has read the foregoing petition and
knows the contents thereof, and that the same is true
of his own knowledge, except as to matters therein
stated on his information or belief, and as to those
matters that he believes it to be true.

FRANK H. POWERS.

Subscribed and sworn to before me this 22d day of July, 1913.

[Notarial Seal] A. K. DAGGETT,
Notary Public, in and for the City and County of
San Francisco, State of California. [9]

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Petition for Removal of Cause. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By Frank A. Prior, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal. [10]

*In the Superior Court of the State of California, in
and for the County of Sacramento.*

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Bond on Removal of Cause.

Know All Men by These Presents: That Pabst Brewing Company, a corporation created, organized and existing under the laws of the State of Wisconsin, the defendant named in the above-entitled action, as Principal, and American Surety Company

of New York, a corporation created, organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto E. Clemens Horst Company, a corporation, the plaintiff in the above-entitled action, and to its successors and assigns, in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made said Pabst Brewing Company and said American Surety Company of New York bind themselves and their successors, and the successors of each of them, jointly and severally, firmly by these presents.

Dated this 22d day of July, 1913. [11]

WHEREAS, the above-entitled action, in which E. Clemens Horst Company is plaintiff and the above-bounden Pabst Brewing Company is defendant, is now pending in the Superior Court of the State of California, in and for the County of Sacramento, and the above-bounden Pabst Brewing Company, has made and filed, or is about to make and file, its petition in said Court for the removal of the said suit into the District Court of the United States, in and for the Northern District of California, Second Division, upon the grounds in said petition set forth, pursuant to the provisions of the Act of Congress in that behalf,—

NOW, THEREFORE, the condition of the above obligation is such that if the above bounden Pabst Brewing Company shall within thirty days from the date of filing said petition, enter in such District Court a certified copy of the record in such suit and shall pay all costs that may be awarded by the said

District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite, then said obligation shall be null and void, and otherwise shall remain in full force and effect.

PABST BREWING COMPANY (a Corporation).

By FRANK H. POWERS, (Seal)
Its Attorney in Fact.

AMERICAN SURETY COMPANY OF
NEW YORK,

By H. J. DOUGLAS,
Resident Vice-president.

[Seal] Attest: V. H. GALLAWAY,
Resident Assistant Secretary. [12]

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Bond on Removal of Cause. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By Frank A. Prior, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal. [13]

*In the Superior Court of the State of California, in
and for the County of Sacramento.*

No. 17,402.—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Notice of Motion for Removal of Cause.

To E. Clemens Horst Company, a Corporation,
Plaintiff Above Named, and to Devlin & Devlin
and W. H. Carlin, Attorneys for the Plaintiff:

You and each of you will please take notice that the petition of Pabst Brewing Company, the defendant, for the removal of the above-entitled suit to the District Court of the United States, in and for the Northern District of California, Second Division, and the bond on removal of the said suit, copies of which petition and bond are hereto attached, will be filed in the above-entitled Superior Court of the State of California, in and for the County of Sacramento, on or before Wednesday, the 23d day of July, 1913, and that on Wednesday, the 23d day of July, 1913, at the hour of 3 o'clock in the *forenoon*, or as soon thereafter as counsel can be heard, the defendant will present the said petition and bond to the said Superior Court in the courtroom of department No. 3 thereof, in the county courthouse, at the City of Sacramento, County of Sacramento, State of California, and will thereupon move and ask the said

Court to make an order accepting the said petition and bond and directing and requiring the clerk of said court to prepare and certify a copy of the record in said suit and directing the removal and transfer thereof to said District Court of [14] the United States in and for the Northern District of California, Second Division.

Said motion will be based upon all the papers and files herein, including said petition and bond, and upon the grounds that the plaintiff was at the time of the commencement of the above-entitled action a corporation created, organized and existing under the laws of the State of New Jersey and a resident and citizen thereof, and that the defendant was at the time of the commencement of the above-entitled action and ever since has been and now is a corporation created, organized and existing under the laws of the State of Wisconsin, and a resident and citizen thereof.

You and each of you will please also take notice that attached hereto is a copy of an order shortening time of service of this notice.

Dated: July 23, 1913.

HELLER POWERS & EHRMAN,
Attorneys for Defendant. [15]

*In the Superior Court of the State of California, in
and for the County of Sacramento.*

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Order Shortening Time.

Upon reading and filing the foregoing notice of motion and good cause appearing therefor,—

IT IS HEREBY ORDERED that the time within which said notice of motion may be served be and the same hereby is shortened so that if said notice of motion be served at any time prior to 2 o'clock P. M. on Wednesday the 23d day of July, 1913, such service shall be valid and of the same effect as if full five days' notice had been given.

Dated this 23d day of July, 1913.

C. N. POST,
Judge of the Superior Court.

[Endorsed]: Filed Jul. 23, 1913. E. F. Pfund,
Clerk. By H. W. Hall, Deputy. [16]

*In the Superior Court of the State of California, in
and for the County of Sacramento.*

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Petition for Removal of Cause.

To the Honorable Superior Court of the State of
California, in and for the City and County of
San Francisco:

Pabst Brewing Company, a corporation, the defendant above named, appearing specially solely for the purpose of presenting this petition, praying for the removal of the above-entitled cause as hereinafter set forth, presents this its petition and respectfully shows to the Court:

That the above-entitled action is a suit of a civil nature of which the District Court of the United States in and for the Northern District of California, Second Division, has original jurisdiction, and that the defendant desires to remove the said suit from the Superior Court of the State of California in and for the County of Sacramento, to the said District Court of the United States in and for the Northern District of California, Second Division;

That the said action was brought in and is now pending in the said Superior Court; [17]

That the time within which this defendant is re-

quired by the laws of the State of California or by any rule or rules of the said Superior Court to answer or plead to the complaint of the plaintiff herein has not elapsed or expired, and the matter in controversy in said suit exceeds, exclusive of interest and costs, the sum and value of Three Thousand (3000) Dollars;

That E. Clemens Horst Company, a corporation, plaintiff in the said suit, was at the time of the commencement of said suit and ever since has been and now is a corporation created, organized and existing under and pursuant to the laws of the State of New Jersey, and a resident and citizen of said State of New Jersey;

That the defendant Pabst Brewing Company, a corporation, the defendant in the above-entitled action, at the time of the commencement of said suit, was and ever since has been and now is a corporation created, organized and existing under the laws of the State of Wisconsin, having its principal place of business in said State of Wisconsin, domiciled and a resident in said last mentioned state and a citizen thereof;

That your petitioner, the defendant above named, herewith presents its bond with American Surety Company of New York, as surety, in the sum of Five Hundred (500) Dollars, for this petitioner's entering in the said District Court, within thirty days from the date of filing this petition, a certified copy of the record in the above-entitled suit, and for this petitioner's paying all costs that may be awarded by the said District Court if said District Court shall

hold that such suit was wrongfully or improperly removed thereto, and also for this [18] petitioner's appearing and entering special bail in such suit, if special bail was originally requisite therein;

That said American Surety Company of New York, the surety named in and that executed the said bond, is a corporation created, organized and existing under the laws of the State of New York, and is duly authorized to execute the said bond in the State of California, and to execute bonds and undertakings as surety receivable in and by all the courts of the State of California and by the said District Court of the United States in and for the Northern District of California, Second Division;

That there are no other parties to the said suit except the said plaintiff and the said defendant;

That by reason of the premises this petitioner, the said defendant, desires and is entitled to have the said suit removed from said Superior Court of the State of California in and for the County of Sacramento into the District Court of the United States in and for the Northern District of California, Second Division;

That the said District Court of the United States, in and for the Northern District of California, Second Division, is the District Court of the United States for the proper District, being the District Court of the United States held in the District where said suit is pending.

WHEREFORE, your petitioner prays that this Court accept this petition and the said bond and proceed no further in the said suit, except to make an

order directing the removal of the said suit as required by law, and to order and direct a certified copy of the record herein to be made as provided [19] by law.

PABST BREWING COMPANY,

By FRANK H. POWERS,

Its Attorney in Fact,

Petitioner.

HELLER, POWERS & EHRMAN,

Attorneys for Petitioner and Defendant, Pabst Brewing Company, Appearing Specially Solely for the Purpose of Presenting this Petition Praying for the Removal of the Above-entitled Cause.

State of California,

City and County of San Francisco,—ss.

Frank H. Powers, being first duly sworn, deposes and says:

That he is the attorney in fact for Pabst Brewing Company, the corporation defendant named as petitioner in the above-entitled petition and that he is duly authorized by said Pabst Brewing Company, as such attorney in fact, to sign this petition and the bond therein referred to; that none of the officers of said corporation reside in or are in the State of California; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to matters therein stated on his information or belief, and as to those matters that he believes it to be true.

FRANK H. POWERS.

Subscribed and sworn to before me this 22d day of
July, 1913.

[Notarial Seal]

A. K. DAGGETT.

Notary Public in and for the City and County of
San Francisco, State of California. [20]

*In the Superior Court of the State of California,
in and for the County of Sacramento.*

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

VS.

PABST BREWING COMPANY, a Corporation,
Defendant.

Bond on Removal of Cause.

Know All Men by These Presents: That Pabst Brewing Company, a corporation created, organized and existing under the laws of the State of Wisconsin, the defendant named in the above-entitled action, as Principal, and American Surety Company of New York, a corporation created, organized and existing under the laws of the State of New York, as Surety, are held and firmly bound unto E. Clemens Horst Company, a corporation, the plaintiff in the above-entitled action, and to its successors and assigns, in the sum of Five Hundred (500) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made said Pabst Brewing Company and said American Surety Company of New York bind themselves and their suc-

cessors, and the successors of each of them, jointly and severally, firmly by these presents.

Dated this 22d day of July, 1913. [21]

WHEREAS, the above-entitled action, in which E. Clemens Horst Company is plaintiff and the above-bounden Pabst Brewing Company is defendant, is now pending in the Superior Court of the State of California, in and for the County of Sacramento, and the above-bounden Pabst Brewing Company, has made and filed, or is about to make and file, its petition in said Court for the removal of the said suit into the District Court of the United States, in and for the Northern District of California, Second Division, upon the grounds in said petition set forth, pursuant to the provisions of the act of Congress in that behalf,—

NOW, THEREFORE, the condition of the above obligation is such that if the above-bounden Pabst Brewing Company shall within thirty days from the date of filing said petition, enter in such District Court a certified copy of the record in such suit and shall pay all costs that may be awarded by the said District Court if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite, then said obligation shall be null and void, and other-

wise shall remain in full force and effect.

PABST BREWING COMPANY (a Corporation),

By FRANK H. POWERS, (Seal)

Its Attorney in Fact.

AMERICAN SURETY COMPANY OF
NEW YORK

By H. J. DOUGLAS,

Resident Vice-President.

[Seal]

Attest: V. H. GALLOWAY,

Resident Assistant Secretary [22]

Service of the within Notice of Motion for Removal of Cause and Order Shortening Time of Service and Receipt of a Copy thereof are hereby admitted this 23d day of July, 1913, reserving all objections.

W. H. CARLIN and

DEVLIN & DEVLIN,

Attorneys for Plaintiff.

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Notice of Motion for Removal of Cause and Order Shortening Time. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By Frank A. Prior, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal. [23]

*In the Superior Court of the State of California in
and for the County of Sacramento.*

No. 17,402—Dept. 3.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

**Order Removing Cause to the District Court of the
United States, in and for the Northern District
of California, Second Division.**

This cause coming on for hearing upon the application of the defendant for an order transferring the cause to the District Court of the United States, in and for the Northern District of California, Second Division, and it appearing and the Court finding that due notice of the application for such removal and of the presentation of a petition and bond therefor has been given as required by law and the order of this Court, and the defendant now in open court, in accordance with said notice, having presented its petition for such removal in due form of law and having presented its bond with good and sufficient surety duly conditioned as required by law, and said petition and bond having been filed in this court and it appearing to the Court that this is a proper cause for removal to said District Court of the United States in and for the Northern District of California, Second Division,—

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that said petition be and the same hereby is accepted and [24] that the said bond be and the same hereby is accepted and approved.

IT IS FURTHER ORDERED AND ADJUDGED that said cause be and it is hereby removed to the District Court of the United States in and for the Northern District of California, Second Division.

Done in open court this 23d day of July, 1913.

C. N. POST,

Judge of the Superior Court.

OFFICE OF THE COUNTY CLERK 714.

State of California,

County of Sacramento,—ss.

I, E. F. Pfund, County Clerk of the County of Sacramento, State of California, and ex-officio clerk of the Superior Court held in and for said county and State aforesaid, hereby certify that I have compared the foregoing copy with the original Complaint, Summons, Petition for Removal of Cause, Bond on Removal of Cause, Notice of Motion for Removal of Cause, Order Shortening Time and Order Removing Cause to the District Court of the U. S. etc., in the above-entitled matter on file and of record in my office, and that same is a full, true and correct copy of such original, with the endorsements thereon, and of the whole thereof.

Attest my hand and seal of said Court this 2d day of August, A. D. 1913

[Seal]

E. F. PFUND,
County Clerk.
By A. Grelich,
Deputy Clerk.

Due service of the within order removing cause, etc., and receipt of a copy thereof are hereby admitted this 23d day of July, 1913.

W. H. CARLIN and
DEVLIN & DEVLIN,
Attorneys for Plaintiff. [25]

[Endorsed]: No. 17,402. Dept. 3. Superior Court, County of Sacramento, State of California. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Order Removing Cause to the District Court of the U. S. etc. Filed Jul. 23, 1913. E. F. Pfund, Clerk. By H. W. Hall, Deputy. Heller, Powers & Ehrman, Attorneys for Defendant. Heller, Powers & Ehrman, Attorneys at Law, Nevada Bank Building, San Francisco, Cal.

[Endorsed]: 1. 15,678. United States District Court. Second Division. E. Clemens Horst Company, a Corporation, Plaintiff, vs. Pabst Brewing Company, a Corporation, Defendant. Certified Copy of Complaint, Original Summons, Petition for Removal of Cause, Bond on Removal of Cause, Notice of Motion for Removal of Cause and Order Shortening Time, and Order Removing Cause to the District Court of the U. S., etc. Filed Aug. 4, 1913.

W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

In the District Court of the United States, in and for the Northern District of California, Second Division.

(Removed from the Superior Court of the County of Sacramento, State of California.)

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Answer.

The defendant in the above-entitled action makes answer to the complaint of the plaintiff in the above-entitled action as follows:

FIRST.

For a first defense, defendant denies and alleges as hereinafter mentioned:

I.

Defendant denies that in the month of August, 1911, or at any time, any contracts in writing, or at all, were made and entered into between the plaintiff and defendant in manner and form as alleged in Paragraph 3 of the complaint, but on the contrary, defendant alleges that in the month of August, 1911, at the City and County of San Francisco, State of California, the plaintiff caused a telegram to be transmitted to the defendant from the said City and County of San Francisco, to the defendant in the

City of Milwaukee, State of Wisconsin, whereby plaintiff offered to sell to the defendant one thousand bales of choice Cosummes air-dried hops of the crop of 1912, at the price of twenty cents a pound f. o. b. cars in the State of California, and defendant, by telegram transmitted by the defendant from Milwaukee aforesaid to the plaintiff at the City and County of [27] San Francisco aforesaid, accepted the said offer; that no time for the delivery of the said one thousand bales of hops and no time for the payment of the purchase price of said hops was proposed or fixed by the said telegraphic offer or by the said telegraphic acceptance; that thereafter, in the same month, the plaintiff, at San Francisco, aforesaid, transmitted another telegram to the defendant at Milwaukee aforesaid, whereby the plaintiff offered to sell to the defendant an additional one thousand bales of choice air-dried Cosummes hops, to be delivered by the plaintiff to the defendant at Milwaukee aforesaid, at the price of twenty cents a pound plus freight thereon from the Pacific Coast, and thereafter in the said month of August, 1911, the defendant, by telegram sent by the defendant from Milwaukee aforesaid to the plaintiff at San Francisco aforesaid, accepted the said last-mentioned offer; that no time for the delivery of the said last-mentioned hops and no time for the payment of the purchase price thereof was proposed or fixed in the last mentioned telegraphic offer and acceptance thereof;

That thereafter, in the month of September, 1911, the plaintiff presented to the defendant, at Mil-

waukee aforesaid, a proposed form of written and printed contract relating to the hops mentioned in the said telegraphic offers and acceptances providing in substance that the time of shipment and delivery of the said hops should be during the months, inclusive, of September to December, meaning the months of September to December, 1912, and also containing many printed clauses and conditions in relation to the proposed sale and delivery of the said hops, which clauses and conditions had not been discussed or referred to in the said telegraphic offer and acceptance, and defendant refused to sign the said proposed contract and did [28] not sign the same, but immediately thereafter and in the said month of September, 1911, the defendant in writing informed the plaintiff that defendant's understanding of any contract between the plaintiff and defendant in relation to the said hops was that shipments and deliveries of the said hops should be made by the plaintiff to defendant during the months of October, November and December of 1912 and January and February of 1913, and that samples of any hops which the plaintiff should offer for delivery to defendant in pursuance of the aforesaid telegraphic offers and acceptances, should and must be submitted by plaintiff to the defendant and be approved by the defendant before shipments and deliveries should be made; that the plaintiff accepted and agreed to defendant's interpretation and understanding of the said telegraphic offers and acceptances, and thereafter, in the months of September and October, 1912, the plaintiff submitted and offered to defendant, for its approval,

before shipment, samples of hops which plaintiff claimed were choice Cosumnes hops of the crop of 1912; that the said samples were not choice Cosumnes hops, but were hops of poor and inferior quality, and defendant refused to approve the same;

That thereafter, in the month of October, 1912, the plaintiff in writing offered the defendant to modify any contract which might have been entered into between the plaintiff and defendant by the telegraphic offers and acceptances as aforesaid, in the following respect, that is to say: The plaintiff in writing offered defendant that if defendant would submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, of such character and quality as the defendant would be willing to accept, the plaintiff would procure and sell and deliver to the defendant two thousand bales of choice Cosumnes hops equal in all respects [29] to the samples so to be presented and submitted by the defendant to the plaintiff; that the defendant accepted the last mentioned offer and did in accordance with said acceptance present and submit to the plaintiff samples of choice Cosumnes hops which it had procured elsewhere, and informed plaintiff in writing that it would be willing to accept and purchase and pay for two thousand bales of choice Cosumnes hops from the defendant if the same were in all things equal in quality to the samples so submitted by defendant to plaintiff; that the plaintiff never did procure or offer or deliver to the defendant any choice Cosumnes hops or any hops equal in quality to the samples submitted by defendant to plain-

tiff as aforesaid, and has never at any time delivered or offered to deliver any choice Cosumnes hops of the crop of 1912, or any hops of the crop of 1912.

II.

That the only contract or contracts ever made between the plaintiff and defendant in relation to the two thousand bales of Cosumnes hops mentioned in the plaintiff's complaint is and are the offers and acceptances mentioned in Paragraph I of this defense as modified as in said Paragraph I of this defense alleged.

III.

Defendant denies that thereafter, in the year 1912, or at any time, the plaintiff offered or tendered two thousand bales of Cosumnes hops of the crop of 1912, or any hops, to defendant; and defendant has no knowledge or information upon the subject sufficient to form a belief as to the allegation that in the year 1912 plaintiff did procure said two thousand bales of Cosumnes hops of the said crop of 1912, and placing its denial upon that ground, defendant denies the last-mentioned allegation; [30] and defendant alleges that if the plaintiff did procure two thousand bales of Cosumnes hops of the crop of 1912, the same were not procured in accordance with the terms or provisions of any contract or agreement with the defendant.

IV.

Defendant denies that the plaintiff performed or offered to perform all or any acts, conditions or things on its part to be performed in accordance with any contract or agreement with the defendant, and

denies that defendant neglected or refused to do and perform any conditions on its part.

V.

Defendant denies that by any failure or refusal on the part of defendant to accept, receive or pay for any hops mentioned in the complaint, the plaintiff has been damaged in the sum of Thirty-two Thousand (32,000) Dollars, or at all.

SECOND.

Defendant by way of counterclaim and cause of action against the plaintiff, alleges:

I.

Defendant at all the times mentioned herein was and now is a corporation organized and existing under the laws of the State of Wisconsin, and plaintiff at all the times mentioned herein was and it now is a corporation organized and existing under the laws of the State of New Jersey.

II.

Between the month of August, 1911, and the month of October, 1912, the plaintiff contracted and agreed with defendant that if defendant would procure and submit to the plaintiff samples of choice Cosumnes hops grown in the State of California [31] in the year 1912, the plaintiff would sell and deliver to the defendant two thousand bales of choice Cosumnes hops grown in the State of California in the year 1912 equal in all respects to the samples so to be presented and submitted by the defendant to plaintiff, and that plaintiff would deliver the said two thousand bales of hops to the defendant f. o. b. cars in the State of California at the price of twenty

cents a pound; that thereupon defendant did procure and submit to the plaintiff samples of choice Cosumnes hops grown in the State of California in the year 1912, and requested and demanded of the plaintiff that plaintiff deliver to the defendant two thousand bales of Cosumnes hops grown in the State of California in the year 1912, equal in all respects to the samples so presented and submitted, but plaintiff broke its said contract and failed and refused to deliver the same to defendant and did not at any time deliver to plaintiff two thousand bales of Cosumnes hops grown in the State of California in the year 1912 equal in all respects or in any respect to the samples so submitted as aforesaid, and did not deliver the same, or any hops, to defendant on cars in the State of California, or at any place, or at all.

III.

By reason of plaintiff's breach of the said contrary defendant has been damaged in the sum of Twenty-five Hundred (2500) Dollars.

WHEREFORE, this defendant prays judgment against plaintiff:

1. That plaintiff take nothing by his said action against the defendant;
2. That the defendant recover against the plaintiff its damages in the sum of Twenty-five Hundred (2500) Dollars; [32]
3. That the defendant recover its costs against the plaintiff.

HELLER, POWERS & EHRMAN,
Attorneys for Defendant.

State of California,
City and County of San Francisco,—ss.

Frank H. Powers, being duly sworn, deposes and says: That he is an attorney at law and a member of the firm of Heller, Powers & Ehrman, who appear in this action as attorneys for the defendant in the foregoing answer; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true;

That the reason this verification is not made by the defendant is that the defendant is a corporation having its office and principal place of business in the State of Wisconsin, and that none of the officers of said defendant who are familiar with the facts in said action are in the State of California where affiant resides.

FRANK H. POWERS.

Subscribed and sworn to before me this 22d day of September, 1913.

[Seal]

LYDA COHN,

Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Sep. 23, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [33]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

(Removed from the Superior Court of the County of
Sacramento, State of California.)

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Demurrer to Answer and Counterclaim.

Comes now the plaintiff in the above-entitled action, and demurs to the answer of the defendant to the complaint of the plaintiff upon the ground that said answer does not state facts sufficient to constitute an answer to the complaint of the plaintiff, or a defense to the cause of action therein alleged.

And said defendant demurs to the alleged counterclaim and cause of action set out in said answer upon the ground that said alleged counterclaim does not state facts sufficient to constitute a counterclaim or cause of action against said plaintiff.

WHEREFORE, said plaintiff prays that this demurrer be sustained and that it have judgment as prayed for in its complaint.

W. H. CARLIN,
DEVLIN & DEVLIN,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 29, 1913. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [34]

At a stated term, to wit, the November term, A. D.
1913, of the District Court of the United States
of America, in and for the Northern District of
California, Second Division, held at the court-
room in the City and County of San Francisco,
on Monday, the 1st day of December, in the year
of our Lord one thousand nine hundred and thir-
teen. Present: The Honorable WILLIAM W.
MORROW, Circuit Judge, designated to hold
and holding this court; the Honorable WILL-
IAM C. VAN FLEET, District Judge, and the
Honorable MAURICE T. DOOLING, District
Judge.

No. 15,678.

E. CLEMENS HORST CO.

vs.

PABST BREWING CO.

**Order Withdrawing Demurrer to Answer and
Motion to Strike Out Parts.**

Ordered that the demurrer to answer and motion
to strike out parts be withdrawn by request on behalf
of plaintiff. [35]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

(Removed from the Superior Court of the County of
Sacramento, State of California.)

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Answer to Counterclaim.

Comes now the plaintiff in the above-entitled action, and answering the alleged counterclaim and cause of action set forth by the defendant in said action, in its answer to the complaint of the plaintiff therein, denies and avers as follows:

I.

Denies that between the month of August, 1911, and the month of October, 1912, or at any other time, the plaintiff contracted and agreed, or contracted or agreed, with defendant that if defendant would procure and submit, or procure or submit, to plaintiff, samples of choice Cosumnes hops or any hops grown in the State of California or elsewhere, in the year 1912, or at any other time, the plaintiff would sell and deliver, or sell or deliver, to the defendant two thousand (2,000) bales of choice Cosumnes hops or any hops grown in the State of California, or elsewhere, in the year 1912, or at any other time, equal in all

respects to any samples to be presented or submitted by defendant to plaintiff, and denies that at said time, or at any other time, plaintiff contracted or agreed with defendant that it would deliver the said two thousand (2,000) bales of hops, or any bales of hops, to the defendant f. o. b. cars in the State of California, or elsewhere, at the price of twenty cents (20¢) per pound or any other price. [36] Admits that during the year 1912 defendant did submit to plaintiff samples of certain hops, but denies that said defendant requested and demanded, or requested or demanded, of plaintiff that plaintiff deliver to defendant two thousand (2,000) bales of Cosumnes hops or any hops grown in the State of California or elsewhere, in the year 1912, equal in all or any respect to samples presented and submitted by defendant to plaintiff, and in that connection plaintiff denies that it ever at any time entered into any contract with regard to any hops, with defendant, save and except the contract declared upon and alleged in its complaint herein, and further alleges that during the year 1912, plaintiff proposed and offered to sell to defendant two thousand (2,000) bales of hops equal in all respects to the said samples so presented and submitted to it by defendant, and that defendant rejected said offer and proposal, and that the same was not accepted by defendant, and that no contract or agreement with regard thereto was made or consummated between plaintiff and defendant. Denies that plaintiff broke any contract whatsoever between it and defendant, and denies that it refused at any time to deliver any hops to defendant.

II.

Denies that by reason of plaintiff's breach of any contract between plaintiff and defendant, defendant has been damaged in the sum of Twenty-five Hundred Dollars (\$2,500.00), or in any sum whatsoever.

WHEREFORE, plaintiff prays that the prayer of defendant's answer be denied, and that it have judgment as prayed for in its original complaint herein.

W. H. CARLIN,
DEVLIN & DEVLIN,
WM. H. DEVLIN,

Attorneys for Plaintiff. [37]

VERIFICATION.

State of California,
County of Sacramento,—ss.

E. C. Horst, being first duly sworn, on oath deposes and says he is an officer, to wit, president of the corporation plaintiff in the within entitled proceeding, and makes this affidavit on its behalf, and that he has read the foregoing and annexed answer, and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon information and belief, and as to such matters, he believes it to be true.

E. C. HORST.

Subscribed and sworn to before me, this 26th day of November, 1913.

[Seal] R. B. TREAT,
Notary Public in and for the County of Sacramento,
State of California.

[Endorsed]: Filed Dec. 1, 1913. W. B. Maling,
Clerk. [38]

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city of Sacramento, on Thursday, the 16th day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,678.

E. CLEMENS HORST CO.

vs.

PABST BREWING CO.

**[Order Granting Leave to Plaintiff to File
Amendments to Complaint.]**

* * * * *

Upon motion of Mr. Devlin, it was ordered that plaintiff be, and it is hereby, granted leave to file amendments to complaint herein.

* * * * *

[39]

*In the District Court of the United States, in and for
the Northern District of California, Second Division.*

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Amendments to Complaint.

The above-named plaintiff, by leave of Court first had and obtained, files the following amendments to its complaint:

I.

After the word "of," in line 25 of page 1, add the following: "choice, air-dried."

II.

After the word "of" where it first occurs, in line 31 of page 1, add the following: "choice, air-dried."

III.

Strike out commencing with the word "card," in line 22 of page 1, and ending with the word "California," in line 22 of same page, and in lieu thereof insert "cars in Milwaukee, Wisconsin, plus freight."

IV.

After the word "and," in line 28 of page 1, insert "on or."

V.

Strike out the word "first," in line 28 of page 1, and in lieu thereof insert "twenty-eight."

VI.

After the word "of," in line 24 of page 1, insert "choice air-dried." [40]

VII.

Strike out the word "full," in line 1 of page 2, and insert "fulfillment thereof."

VIII.

After the word "thereof," in line 4 of page 2, add the following: "That during the month of November, 1912, the said defendant, in writing, notified

the plaintiff that it renounced and repudiated the said contract, and did not, at any time, withdraw the same.”

Dated April 16th, 1914.

W. H. CARLIN and
DEVLIN & DEVLIN,
Attorneys for Plaintiff.

State of California,
County of Sacramento,—ss.

E. C. Horst, being first duly sworn, on oath deposes and says he is the president of E. Clemens Horst Company (a corporation), the plaintiff in the within entitled proceeding, and that he has read the foregoing and annexed amendments to complaint, and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon information and belief, and as to such matters, he believes it to be true. That he makes this verification for and on behalf of said corporation.

E. C. HORST.

Subscribed and sworn to before me, this 15th day of April, 1914.

[Seal] C. S. WOODWORTH,
Notary Public in and for the County of Sacramento,
State of California.

[Endorsed]: Filed April 16th, 1914. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy. [41]

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the city of Sacramento, on Tuesday, the 21st day of April, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,678.

E. CLEMENS HORST CO.,

vs.

PABST BREWING CO.

**Order Allowing Plaintiff to File Amended
Complaint.**

* * * * *

On motion of Mr. Devlin, it was ordered that plaintiff be, and is hereby, allowed to file an amended complaint. [42]

* * * * *

*In the District Court of the United States, in and for
the Northern District of California, Second Division.*

(Removed from the Superior Court of the County of
Sacramento, State of California.)

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Amended Complaint.

Comes now the plaintiff by leave of the Court first had and obtained, and amends the complaint by amending the prayer thereof so as to read as follows:

WHEREFORE, plaintiff prays judgment of the court against defendant in the sum of Thirty-two thousand Dollars (\$32,000.00), and interest thereon at the rate of seven per cent per annum from the first day of March, 1913, to entry of judgment, and also for its costs of suit and such other, further or different relief as may be meet and proper.

DEVLIN & DEVLIN,
Attorneys for Plaintiff.

[Endorsed]: Filed April 21st, 1914, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy.

Personal service hereof by copy admitted this 20th day of April, 1914.

HELLER, POWERS & EHRMAN,
Attorneys for Deft. [43]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Twenty-two Thousand Six Hundred and Twenty-five 30/100 Dollars (\$22625 30/100).

S. B. SMITH,
Foreman.

[Endorsed]: Filed April 29, 1914, W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [44]

*In the District Court of the United States, in and for
the Northern District of California, Second Di-
vision.*

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

Judgment on Verdict.

This cause having come on regularly for trial on the 16th day of April, 1914, being a day in the April, 1914, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; Robert T. Devlin, M. E. Harrison and S. T. Jeffries, Esqrs., appearing as attorneys for the plaintiff and Frank H. Powers, Esq., and Messrs. Butler and Swisler, appearing as attorneys for the defendant, and the trial having been proceeded with on the 17th, 21st, 22d, 23d, 24th, 27th,

28th and 29th days of April, all in said year and term, and evidence oral and documentary upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely; "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Twenty-two Thousand Six Hundred Twenty-five 30/100 Dollars (\$22,625 30/100) S. B. Smith, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the E. Clemens Horst Company, a corporation, plaintiff, do have and [45] recover of and from the Pabst Brewing Company, a corporation, defendant, the sum of Twenty-two Thousand Six Hundred Twenty-five and 30/100 (\$22,625.30) Dollars, together with its costs in this behalf expended taxed at \$252.80.

Judgment entered April 29, 1914.

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

A true copy. Attest:

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed April 29, 1914. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[46]

*In the District Court of the United States, for the
Northern District of California.*

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
vs.

PABST BREWING COMPANY, a Corporation,

Clerk's Certificate to Judgment-roll.

I, W. B. Maling, clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court, this 29th day of April, 1914.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk.

[Endorsed]: Filed April 29th, 1914. Walter B. Maling. By J. A. Schaertzer, Deputy Clerk.[47]

[Bill of Exceptions.]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,678.

E. CLEMENS HORST COMPANY, a Corporation,
Plaintiff,

vs.

PABST BREWING COMPANY, a Corporation,
Defendant.

BE IT REMEMBERED that on the 16th day of April, 1914, the above-entitled action came on for trial in the above-entitled court before Hon. Wm. C. Van Fleet, presiding, and a jury, Messrs. Devlin & Devlin and W. H. Carlin, Esq., appearing as attorneys for plaintiff, and Heller, Powers & Ehrman, appearing as attorneys for defendant, with Butler & Swisler of counsel. After the jury was impanelled the following proceedings were had and testimony introduced and the same constitutes all the testimony given to the jury.

Robert Devlin, Esq., made a statement of plaintiff's intention to prove; thereupon Mr. Devlin offered and read in evidence the following papers:

NIGHT LETTER.

“San Francisco, Aug. 21st, 1911.

PABST BREWING CO.,
Milwaukee, Wis.

We offer you for immediate or later shipment subject to your telegraphic acceptance tomorrow and our

confirmation of sale one thousand bales new crop choice brewing air dried coast hops at forty cents plus freight account heavy buying for England and other foreign countries our market is active and advancing [48] fast.

E. CLEMENS HORST CO.

Charge E. C. H. Co."

TELEGRAM.

149Ch. e. 18.

Milwaukee, Wis., August 22, 1911.

E. Clemens Horst Co.

San Francisco.

Provided section from which you propose furnishing satisfactory offer forty cents Milwaukee five hundred bales strictly choice deliver.

PABST BRG. CO.

906 AM.

DAY LETTER.

S. F. Aug. 24/11.

PABST BREWING CO.,

Milwaukee, Wisc.

We confirm sale five hundred bales air dried Cosumnes elevens at forty cents delivered for shipment August December inclusive period we offer thousand air dried Cosumnes Twelves at Twenty plus freight period please wire when interested more elevens.

E. CLEMENS HORST CO.

Charge E. C. Horst Co.

W. U. T. Co.

TELEGRAM.

Copy.

Milwaukee Wis. August 25, 1911.

E. CLEMONS HORST CO.

San Francisco, Cal.

Will take thousand bales Cosumnes twelve strictly
choice quality twenty cents fob milwaukee

PABST BREWING CO.

330 PM. [49]

NIGHT LETTERGRAM.

San Francisco, August 25, 1911.

PABST BREWING CO.,

Milwaukee, Wis.

We offer one thousand bales twelve choice air dried
Cosumnes delivered Milwaukee at twenty cents plus
freight this is positively best we can do we expect
twelves to run about thirty cents coast period refer-
ring our todays telegram please rush guarantee to
bank here and also please telegraph bank guarantee-
ing payment our drafts against warehouse receipts
or ladings for sixty eight and two fifths cents bushel
on two hundred thousand contract August fifteenth
also seventy nine and one fifth cents bushel on fifty
thousand chevelier also eighty one cents bushel on ten
thousand moravian.

E. CLEMENS HORST CO.

Charge ECH. Co.

DAY LETTER.

Milwaukee, Wis., Aug. 26, '11.

To E. C. HORST CO.

San Francisco, Cal.

We accept offer one thousand bales choice cosum-

nes air dried nineteen twelve crop twenty cents fob period have wired bank California guaranteeing your drafts on us as requested period all drafts so far paid by us have only warehouse receipts attached how about the hundred thousand shipments you agreed to make this month we need the barley answer.

PABST BREWING CO.

11.33 A. M.

TELEGRAM.

San Francisco, August 29, 1911.

PABST BREWING CO., [50]

Milwaukee, Wis.

We confirm sale to you of another one thousand bales choice nineteen twelve crop cosumnes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales what is best price you will entertain on five or thousand bales same quality eleven crop.

E. CLEMENS HORST CO.

TELEGRAM.

Milwaukee, Wis., August 28, 1911.

E. CLEMENS HORST CO.

San Francisco.

We accept your offer one thousand bales strictly choice Cosumnes nineteen twelve crop at twenty cents fob please confirm.

PABST BREWING CO.

222 P. M.

NIGHT LETTERGRAM.

San Francisco, August 27, 1911.

PABST BREWING CO.,

Milwaukee, Wis.

We confirm sale to you of one thousand bales nineteen twelve crop Choice air dried cosumnes delivered at Milwaukee at twenty cents plus freight from Coast period This in accordance with our telegraphic offer of the twenty fifth period. Offer you additional thousand bales at same price also offer you subject our confirmation of sale *of sale* additional thousand bales eleven crop at forty cents delivered at Milwaukee freight paid period Our offer on twelve crop from your stand point is exceptionally low one period As our sales of twelve crop increase will increase price accordingly only able to make you this low offer because of our unsold surplus.

E. CLEMENS HORST CO.

Charge E. C. H. Co. [51]

Sept. 1st, 1911.

In reply refer to S-39796.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:—

We have just discovered that we inadvertently overlooked confirming our night lettergram to you of August 29th, as follows:

“We confirm sale to you of another one thousand bales choice nineteen twelve crop Cosumnes at twenty cents delivered Milwaukee plus freight charges making total sales to you of nineteen twelve crop two thousand bales What is best

price you will entertain on five hundred or thousand bales same quality eleven crop."

We feel satisfied that both of your contracts for 1912 crop Hops at 20¢ plus freight from the Coast will prove a most profitable investment to you, and we assure you that your order is appreciated and will receive our most careful attention.

Yours faithfully,

E. CLEMENS HORST CO.,

TBS/J

NIGHT LETTERGRAM.

San Francisco, Sept. 27, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Mr. George wires us you are now negotiating resale to other dealers of the two thousand bales Cosumnes we sold you and that you wish all these Hops held on Coast until you order hops forwarded period We are willing hold these hops on coast if you accept deliveries now on coast less freight allowance period we are willing resell the two thousand bales for your account or we are willing to exchange all or part for nineteen twelve Oregons or Yakimas at difference in price or we are willing make term contract for Yakimas and cancel sale Cosumnes twelves period You can appreciate that we must know your conclusions now so we can complete our nineteen twelve deliveries to other buyers please wire us fully direct to Sanfrancisco period. We do not think you can rush sale of two thousand Cosumnes

as all big deals at present are for Oregons for export.

E. CLEMENS HORST CO. [52]

Charge E. C. H. Co.

154 words.

San Francisco, October 15, 1912.

In Reply refer to S-55,445.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:—

We confirm interchange of telegrams with you to-day, as follows:

Received from you—

“Must see samples Cosumnes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast.”

Sent to you—

“If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit you further samples without we buy hops and we cannot buy and increase our stocks unless you wire you will accept hops equal your samples period In replying please answer yesterdays inquiry from whom your samples received period. We offer our best services for resale of any hops you do not require.”

Yours faithfully,

E. CLEMENS HORST CO.,

TBS-PK.

Thereupon the following witnesses were sworn on behalf of plaintiff and testified as follows:

[Testimony of E. Clemens Horst, for Plaintiff.]

E. CLEMENS HORST, direct examination by Mr. Devlin:

I am a hop grower and dealer and have been engaged as a grower for fifteen years and as a dealer for the last twenty-five years, and have bought and sold and raised hops and am familiar with the terms and usage of the trade and have sold hops all over the world.

In 1912, I was engaged in raising hops in what is known as the Cosumnes River District in Sacramento County, and have been thus engaged for about nine years. [53]

I have about four hundred acres under cultivation.

The Cosumnes District consists of about eight or nine hundred acres along the Cosumnes River in Sacramento County.

There are other districts in Sacramento County, such as American River and Sacramento River District, also Yolo County District.

Those that are grown along the Sacramento River are called "Riverside."

There is also Yuba District, Tehama District, Russian River District.

Yakima hops are grown in Yakima County and there are also Oregon hops.

I am familiar with the crop that grew on my place in the year 1912 and saw the bales.

We sent samples to the Pabst Brewing Company taken from our 1912 crop.

Air-dried as used in the contract between Pabst

(Testimony of E. Clemens Horst.)

Brewing Company means hops that are dried by forced air. They are distinguished from the kiln dried hops.

In the kiln dried the heat is inside and comes from a stove in the building, and in the air dried, the air is warmed outside of the building and blown in there.

There is a distinction in quality between the hops because the air-dried hops retain the oils and resins better than the kiln-dried hops.

That is supposed to be an advantage.

The hops raised on our place in 1912 were air-dried hops and no one else in that section of the country dried hops by the air drying process, except plaintiff.

We raised something over 4500 bales that year.

We divided the hops into two classes. [54]

The hops are all picked by machinery and certain hops called clean-ups in the regular process of picking accumulate around the plant and they are kept separate. There was about 150 bales of clean ups and about 4350 bales of choice hops.

Clean-up hops are broken up in the process of picking and accumulate during the day.

We put the clean-ups in separate bales that year.

Q. I will ask you whether or not that is the practice of hop growers, or whether you did this yourself, and it is an exception to the rule?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Exception #1.

A. The custom is to have all the hops together.

(Testimony of E. Clemens Horst.)

The general practice is to have all of the hops together, but we made an exception to that practice in 1912 Cosumnes crop. As to the 4300 bales or thereabouts, they were choice.

Q. What is generally understood in the hop trade as choice hops?

A. The best mean average quality of the district. The hops were clean picked, well cured and had no defect such as rust or mould.

Q. Is there a practice or usage among hop buyers and hop dealers as to the delivery of hops when no time is specified?

Mr. POWERS.—We object to that question and move that the answer be stricken out. We object on the ground that it is irrelevant, incompetent and immaterial, unless it be shown that the custom is universal.

The COURT.—Objection overruled.

A. Yes.

Q. In other words whether there is known as a hop season? A. Yes.

Mr. POWERS.—Exception.

Exception #2. [55]

The COURT.—Taking as an illustration the alleged contract here, having reference to the hops of 1912, the contract calling for the delivery of hops of that year, what is the customary understanding as to the time of delivery where it is not there specified?

A. To ship them during the so-called shipping season, of that year, which would be from the time

(Testimony of E. Clemens Horst.)

of the harvest up to the end of February or perhaps March of the following year.

Q. If no time is specified in the contract for the delivery of hops where the hops are to be of a subsequent year's growth, is there any practice or usage in the trade whereby the seller will have to the end of the shipping season, or if not, what time is he to fulfill the contract for the delivery of those hops?

Mr. POWERS.—We object as irrelevant, incompetent and immaterial and on the ground that it is assumed that there is such a custom universal among hop dealers.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #3.

A. The seller has until the end of the shipping season to make his delivery or shipment.

We did not deliver the 2,000 bales of hops.

I submitted them samples at their request. They telegraphed back and rejected the samples, saying that the samples were not choice, and I telegraphed back.

Mr. DEVLIN.—We offer in evidence a night letter dated November 4th, 1912, addressed by the Pabst Brewing Company to Horst Company: [56]

POSTAL TELEGRAPH-CABLE COMPANY.

NIGHT LETTERGRAM.

777CH A 34 NL

Milwaukee Wis Nov. 4, 12.

E. Clemens Horst Co.

San Francisco.

Cannot accept samples as they are not according

(Testimony of E. Clemens Horst.)

to choice quality specified in contract we herewith cancel contract for two thousand bales entered into with you because of your inability to comply with specifications.

PABST BRG CO.

725 P.

Mr. DEVLIN.—We offer in evidence night letter sent by Horst Company to the Pabst Brewing Co., dated November 5th, 1912:

POSTAL TELEGRAM CABLE COMPANY.

NIGHT LETTERGRAM.

San Francisco, Nov. 5/1912.

Pabst Brewing Co.,

Milwaukee, Wis.

Replying to your yesterdays wire received to-day we disagree with your comments on quality of samples sent you and to your statement that we are unable to comply with our contracts with you Please wire us in what respects you claim samples twenty five to thirty eight inclusive to be below contracted quality and whether you claim none of all samples sent you is equal contracted quality Please also wire whether you will pay us decline in market if we consent cancellation two thousand bale sale we cannot release contracts without proper settlement we suggest that our letter October eighteenth offers fairest method of adjusting matter We are willing submit further samples and are willing that Chief Inspector of San Francisco Chamber of Commerce or other high class [57] competent disinterested

parties to be agreed upon shall pass upon quality.

E. CLEMENS HORST CO.

Charge E.C.H. Co.

137 Words.

Mr. POWERS.—We object on the ground that this is an attempt at compromise and is not admissible in evidence.

The COURT.—Objection overruled.

Mr. POWERS.—Exception. Exception noted.

Exception #4.

Mr. DEVLIN.—We offer in evidence the following letters:

DAY LETTER.

WESTERN UNION TELEGRAPH COMPANY.

Received at S. E. Cor. Pine and Montgomery Sts.,
San Francisco.

W 1071 CH UN 93 Blue

Milwaukee Wis. Nov. 7, 1912.

E. Clemens Horst Co.,
San Francisco.

Samples we sent you represent choice quality consumnes which our contract specifies and to which none of your samples compare period our judgment and experience sufficient to warrant our action in cancelling contract because of insufficient quality samples submitted by you period have partially covered quality at higher than our contract price with you because of our rejection therefore will not entertain suggestion to pay you difference period will not have further discussion on this and if you consider our action arbitrary take such action as

(Testimony of E. Clemens Horst.)

you may deem best for your interest.

PABST BRG. CO. 11:40 A. M.

NIGHT LETTER.

S. F. Nov. 7, 12. [58]

Pabst Brewing Co.,

Milwaukee, Wisc.

We cannot possibly realize anything like contract price for any Coast Hops regardless quality and with present weak and declining market and big American Hop surplus it is impossible to find buyers for Two Thousand bales except at big sacrifice from present low prices period we respectfully repeat our request that you specify in what particulars samples last sent are claimed below contract requirements we will then without prejudice our rights submit further samples of contracted quality satisfactory to your period we repeat our offer to arbitrate period if you decline abitrate we hope you will co-operate with us to adjust differences.

E. CLEMENS HORST CO.,

Charge

E. Clemens Horst Co.

via W. U. T. Co.

Mr. POWERS.—We object as argumentative and as a self serving declaration anticipatory of a law suit and an offer of a compromise, and as irrelevant, incompetent and immaterial.

The COURT.—Objection overruled. Exception noted.

Exception 5.

(Testimony of E. Clemens Horst.)

San Francisco, November 8, 1912.

In reply refer to H-55804.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:—

We confirm interchange of telegrams with you, as follows:—

Received from you November 7th—(Day Letter)

“Samples we sent you represent choice quality Cosumnes which our contract specifies and to which none of your samples compare period Our judgment and experience sufficient to warrant our action in cancelling contract because [59] of our rejection Therefore will not entertain suggestion to pay you difference period Will not have further discussion on this and if you consider our action arbitrary take such action as you may deem best for your interests.”

Sent to you November 7th—(Night Letter)

“We cannot possibly realize anything like contract price for any Coast hops regardless quality and with present weak and declining market and big American hop surplus it is impossible to find buyers for two thousand bales except at big sacrifice from present low prices period. We respectfully repeat our request that you specify in what particulars samples last sent you are claimed below contract requirements we will then without prejudice our rights submit further samples of contracted quality satisfactory to you period We repeat

(Testimony of E. Clemens Horst.)

our offer to arbitrate period If you decline arbitrate we hope you will co-operate with us to adjust differences.”

Yours faithfully,

E. CLEMENS HORST CO.

E. C. HORST, Pres.

ECH/PK

San Francisco, November 12, 1912.

In reply refer to H— 57411

PABST BREWING COMPANY,

Milwaukee, Wis.

Gentlemen:—

We confirm telegrams with you today, as follows:
Sent to you—

“Received no reply wire November seventh would appreciate reply.”

Received from you—

“Our day letter seventh fully states our position.”

Sent to you—“(Night Letter)

“We understand from previous correspondence that you will not accept deliveries equal to any of the samples in the two lots of samples we sent you and that you will not consider any further samples we may submit you for delivery and that you will not accept any deliveries from us and that you will not arbitrate period Upon receipt of your confirmation of your above position we will not trouble you with further communications except by your request though we would appreciate [60] personal interview

(Testimony of E. Clemens Horst.)

later on with a view of adjusting matters.”

Your faithfully,

E. CLEMONS HORST CO.,

ECH/PK

E. C. HORST, Pres.

Note: Postal Tel. Co. phoned Nov. 13/12 in reference to this wire, said that Pabst had sent a query as to whether the word “in” in the second line should be “of.” I answered telegram correct as sent.

Nov. 13/12.

Mr. DEVLIN.—I also introduce the following telegrams:

PABST BREWING COMPANY.

Milwaukee, Wis. Oct. 4th, 1912.

E. C. Horst Co.,

San Francisco, Cal.

Gentlemen:—

Your valued favor of the 28th ult., at hand and contents noted. Have also received the line of samples of Consummes hops, which should represent our order of 2000 bales for this season, but are sorry to state that after very close inspection it will be impossible for us to accept hops of this nature on our contract, as same are not choice.

Yours truly,

PABST BREWING COMPANY.

CZ-M

By C. Z.

(Testimony of E. Clemens Horst.)

TELEGRAM.

San Francisco, Oct. 9th, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Please wire our expense wherein you claim samples submitted are below quality sold we are anxious do everything to meet your wishes.

E. CLEMENS HORST CO.

Charge E. C. H. Co.

22 words. [61]

NIGHT LETTERGRAM.

San Francisco, Oct. 9, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Referring your todays wire please send us line of samples of such cosumnes hops as you will accept.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

TELEGRAM.

516 chwx 29.

Milwaukee, Wis. Oct. 9/12.

E. CLEMENS HORST CO.

San Fran.

Answering your telegram ninth color shows no life picking poor flavor and substance of samples submitted by you in no way compare with other choice consumnes submittes by others.

PABST BRG. CO. 136 P.

(Testimony of E. Clemens Horst.)

PABST BREWING COMPANY.

Milwaukee, Wis., October 10th, 1912.

E. CLEMENS HORST CO.

San Francisco, Cal.

Gentlemen:—

In reply to your telegram of to-day, we beg to state that we have forwarded your four samples of choice Cosumnes hops.

Kindly compare these with your samples, and oblige,

Yours truly,

PABST BREWING COMPANY.

CZ-M.

By CZ. [62]

NIGHT LETTERGRAM

San Francisco, October 14, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Have received from you two of four samples advised in your letter October tenth please wire us that you will accept deliveries equal to those four samples and we will try arrange deliveries accordingly and if you wil please wire us from whom you received the four samples you sent us we will try to purchase the identical lots for deliveries to you.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

63 words.

(Testimony of E. Clemens Horst.)

NIGHT LETTERGRAM.

San Francisco, October 15, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

If you wire you will accept hops equal samples you sent we will arrange accumulate such hops for you but we cannot submit you further samples without we buy hops and we cannot buy and increase our stocks unless you wire you will accept hops equal your samples period in replying please answer yesterday's inquiry from whom your samples received period we offer our best services for resale of any hops you do not require.

E. CLEMENS HORST CO.

Chge. E. C. H. Co.

DAY LETTER.

W. 1095 CH FS CX 22 Blue.

Milwaukee, Wis., Oct. 15-12.

E. CLEMENS HORST CO.

San Francisco, Calif. [63]

Must see samples consummes deliveries you can make equal four samples mailed you as we expect to dispose of same on coast.

PABST BRG. CO. 12 10 PM.

Mr. DEVLIN.—I offer the following letters:

San Francisco, Oct. 18th, 1912.

In reply refer to H-53959.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:—

We are without answer from you to our wire of Oct. 15th.

(Testimony of E. Clemens Horst.)

As you will not take the 2000 bales of Hops sold you on quality equal to any of the 20 samples we sent you, nor commit yourselves to take any Hops equal to the four samples you sent us, we feel the fair plan that should be most suitable to you will be to agree upon a difference in price to be paid us on the 2000 bales.

To arrive at that amount, we should get, if market had not changed, the fair profit as between simultaneous buying and selling prices, and as market has declined we should get in addition, the decline in the market, but if you think that this is asking too much we are ready to accept, subject to our confirmation within three business days after receipt of your reply, whatever may be the difference between the contract price and any figure you may offer us now on 2000 bales 1912 Hops equal to the four samples you sent us, or to the selection of the 20 we sent you. The new offer to be made on basis of delivery in lot or lots at seller's option during October to February inclusive, and official inspection of the San Francisco Chamber of Commerce, or other inspection to be mutually agreed upon, to be final.

Or if you prefer to delay the fixing of price on above plan, we are willing that you pay us the difference as of a later date plus what would be the carrying charges on 2000 bales Hops, which we estimate to amount to about \$750.00 per month covering interest, storage, insurance and loss in weight. The delay in delivery has already entailed a loss of

(Testimony of E. Clemens Horst.)

\$1000.00 on such charges, but we are not asking you to make good that \$1000.00.

On our above plan you cannot increase your losses nor your hop stocks, because if we accept the price you offer on the new 2000 bale deal you will not have increased your stocks, as our acceptance of your offer will have cancelled the old deal and the new price you offer will be used as a basis for our arriving at the amount of money you should pay us by reason of cancellation of your present contract.

We have made our suggestion for the new offer to buy 2000 bales simply so you do not wire us a too high price for basis of adjustment. [64]

You no doubt realize that 2000 bales Hops is an enormous block of Hops to sell at any time of the year and at a time as late as this it is always much harder to sell Californian Hops and there is an enormous difference between the price at which anyone in the Hop business would buy 2000 bales and the price at which he would sell 2000 bales, unless, of course, the purchase was being made without speculation against a concurrent sale or offer.

In order to realize anything like current prices for Hops they have to be peddled at enormous selling costs and we really do not know how long it will take us to sell elsewhere 2000 bales Californian Hops so late in the season, but we want to help out all that is possible.

We made you a number of offers to change your purchases to Sonomas, Oregons, Washingtons, Yakimas, States of foreign 1912's or to change from

(Testimony of E. Clemens Horst.)

1912's to future years, all at fair price differences to be agreed upon, but regret that these suggestions, as well as our offers, both before and since the harvest, to resell for your account your 2000 bales purchased were all declined.

We are desirous of impressing upon you that we do not wish the slightest advantage by reason of your change of mind on your Cosumnes Hop Purchases, but we do ask your consideration for a prompt and fair adjustment of the matter and we hope our above suggestion will meet your approval.

No doubt you realize that your publishing the fact that you will not use Cosumnes Hops greatly depreciates their market value and the greater such depreciation the greater your loss, and, therefore, it is far better in both your interest and ours that the market value of the Cosumnes Hops be maintained.

There are plenty of brewers that are having successful results with our Cosumnes Hops and it does not pay to influence their minds against them.

Faithfully,

E. CLEMENS HORST CO.

E. C. HORST,

Pres.

ECH/J. [65]

Referring to telegram of October 9th, 1912, addressed to E. Clemens Horst by the Pabst Brewing Company, I saw the samples referred to in that telegram for the purpose of ascertaining and knowing their quality.

With reference to the expression "color shows no

(Testimony of E. Clemens Horst.)

life," I wish to say that the color of these samples was all right. They were cleanly picked, the flavor was all right, it was good flavor.

Q. Will you state whether or not the hops that you grew on your place in 1912, were or were not choice air-dried Cosumnes hops?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial unless connected with the defendant.

The COURT.—They are connecting the hops with the defendant as fast as they can. If they do not finally succeed in doing it, then you may strike this testimony out.

A. Yes.

Q. State whether you were able or not to deliver out of the 4300 bales you have specified, the 2000 bales of hops for the purpose of filling this contract for the Pabst Brewing Company?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial.

The COURT.—Of the quality which the contract called for?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial, and not connected with this defendant. [66]

The COURT.—Objoceion overruled. Exception.

Mr. POWERS.—Exception.

Exception #6.

A. Yes. The samples sent to them were choice air-dried Cosumnes hops and they were from these bales.

(Testimony of E. Clemens Horst.)

The COURT.—Mr. Horst, you observe that in the reading of the telegraphic communication constituting the alleged contract, that no reference is made to the submission of samples at all. How did you come to send these samples to them?

A. They asked that we send them samples after the trade was made. They told us they wanted to resell the hops. They were not going to use Cosumnes hops at all. They asked us to send samples.

Q. Were you obligated under the customs of the trade, under a contract of that kind, to send samples?

A. No, sir.

Q. You then did it voluntarily?

A. Yes. The trade customs do not call for it. In some cases the seller submits samples where he expects the hops are not going to be taken any way. The most of the hops of a given crop are sold before the harvest, contracted for in advance. There is no such place as a well-known hop market. There is no hop market at Milwaukee. The sales can be made anywhere.

Q. Where are California hops grown on the coast generally sold and where are purchases made?

A. Where are the purchases made?

Q. Where are the contracts generally made?

A. They can be made anywhere.

Q. Are you familiar with the prices that could be obtained or were obtained in November 4th, 1912, down to and including, say, the first day of March, 1913?

A. Yes, sir.

Choice air-dried Cosumnes hops could not be sold

(Testimony of E. Clemens Horst.)

in that quantity at any price. Because the buying season is over about the middle of October, the beginning of October, the season is [67] practically over, and after that time it is simply a retail trade. I do not know just how many hops were left in the Cosumnes District at that time. I believe a few hundred bales were left over. Sacramento would be the nearest market, the most of the business would be done in Sacramento hops in Sacramento. It would not be possible to market that quantity of hops in Sacramento at that time at a profit. There is really no such thing as a market price for hops, because hops are sold on private contract, and are sold in advance.

Mr. DEVLIN.—I want to show if there was any market that Sacramento or San Francisco would be the place for the sale of the hops.

The COURT.—There is such a thing as the London market?

A. There is no market in London for Sacramento hops.

The COURT.—There are quotations in the paper of prices of hops on the London market and on the New York market.

The WITNES.—But not California hops. The London market handle a particular kind of hops.

The brewers in England and the trade in England buy a different character of hops. They buy very dry yellow hops that are grown in Oregon, in the Sonoma District, and in the Russian River District. They do not buy the class of hops grown in Sacra-

(Testimony of E. Clemens Horst.)

mento County. The Sacramento hop is like the hop grown in continental Europe, and when England buys hops, it buys what is known as the Oregon type. They are two entirely different types of hops.

Sacramento has a green hop and Oregon has a yellow hop.

The market was declining very rapidly from November 4th, down to and including the first day of March. [68]

It is not possible to sell 2000 bales of one kind of hops on a declining market. The market at the time after the same was made was roughly, twenty cents on contract price. From that price the market went up to about 28 cents, that was before harvest time. Then it went down until about the harvest time it was in the neighborhood of 17 or 18 cents, and gradually went down until it got down to about 12 or 13 cents.

As soon as you get up to the next crop, people stop buying the next.

Q. What has the 1913 crop to do with the 1912 crop?

A. As soon as you get up to the next crop, people stop buying the old crop.

The old crop is practically unsalable.

Q. As an expert, if a man had 2000 bales of Co-sunnes hops of the 1912 crop on hand in November, and was not able to dispose of them until February or March when they began to sell the 1913 crop, could he sell the 1912 crop at the same price as the 1913 crop?

(Testimony of E. Clemens Horst.)

A. No, sir; not if there was a surplus of the 1912 crop.

Q. What did you do with these 2000 bales of hops that you sold to the Pabst Brewing Company and that they refused to accept?

Mr. POWERS.—I object to the question on the ground that it takes into consideration that there was a sale of 2000 bales of hops, and there is nothing in the testimony that there was a sale of 2000 bales of hops.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #7.

We sold them as we got opportunities for selling them through our traveling men in the east. They could not possible be sold in one lot because 2000 bales is an enormous quantity of hops. To sell that out in one lot it would simply [69] be a case of slaughtering.

There are two hundred pounds to a bale. Hops grown in this part of the country run from 180 to 215 pounds. They are baled in a press. The presses are uniform.

Q. How many pounds does a bale of hops contain?

Mr. POWERS.—I object to the question on the ground that it is irrelevant, incompetent and immaterial. The contract, the alleged contract, specifies 2000 bales, and we ought to know what those 2000 bales actually weigh.

The COURT.—The objection is overruled. There is a usual and ordinary method of packing a com-

(Testimony of E. Clemens Horst.)

modity of that kind.

Mr. POWERS.—We except.

Exception #8.

A. About 200 pounds.

Q. The presses are uniform?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial. This alleged contract specifies 2000 bales. I submit it is irrelevant, incompetent and immaterial.

The COURT.—I will overrule the objection.

Mr. POWERS.—Exception.

Exception #9.

A. Yes. We sold them just as though they were our own hops. Our salesmen went over the country with the samples. We tried in good faith to sell them at the best advantage. It took a long time to sell [70] them and in selling these hops we incurred traveling expenses, insurance and brokerage.

Q. Was the amount taken from your books?

Mr. POWERS.—The books are the best evidence.

Mr. DEVLIN.—If you want the books, we will bring them here.

Mr. POWERS.—We do.

Mr. POWERS.—We do. The books show the amount we received for the hops, our expenses and so forth. There are about a dozen large books, contain other extracts of a private nature.

Mr. DEVLIN.—The books could be brought into court but it would take a great deal of time.

Mr. POWERS.—I would prefer to examine the books in the ordinary way.

(Testimony of E. Clemens Horst.)

The COURT.—They do not need to be brought here. Counsel may have an opportunity of examining these different items.

WITNESS.—I am personally familiar with the several items outside of the books. I have made extracts from the books in a tabulated form.

Q. Please produce it.

Mr. POWERS.—We object on the ground that it is irrelevant, incompetent and immaterial, a self serving declaration, made by the party himself, and the books themselves are the best evidence.

The COURT.—The books are the best evidence, but he has a right to testify to the result derived from an examination of these books. You may verify them on cross-examination after having had an opportunity to examine the books. [71]

Mr. POWERS.—Exception.

Exception #10.

Q. What is your first sale?

A. There are forty sales here.

Q. What is the date of the first one?

A. November 19th. On November 4th, we had on hand 2000 bales of air-dried Cosumnes hops the same as I have testified to.

Q. State what you did about selling them and the prices you realized.

A. We sold to W. P. Downey, Montreal, Quebec; the sales prices are deducting freight to destination, and any other items, it was 17 cents. That sale was three bales. The next is to the F. Steil Brewing Company, Baltimore, Maryland, 14½ cents, 50 bales.

(Testimony of E. Clemens Horst.)

A. This is November, 1912. The next is the Park Brewing Company, Providence, Rhode Island, 5 bales, 17½ cents. The next is to Springfield Brewing Company, Massachusetts, 98 bales, 14 cents. The next is to F. W. George & Company, Providence, Rhode Island, 1 bale, 16 cents. Narragansett Brewing Company, Providence, Rhode Island, 100 bales at 16 cents. G. F. Rothaker Brewing Company, Philadelphia, Pennsylvania, 25 bales at 16 cents. These prices are deducting freight or any other charges.

Mr. DEVLIN.—I will ask you that later.

A. The next is Gutsch Brewing Company, Chicago, 3 bales at 17 cents. Pulkrabek, Chicago, 1 bale at 16¾ cents. Hoffer Brewing Company, New York, [72] 25 bales at 15 cents. Medina Brewing Company, Medina, Ohio, 5 bales at 18 cents. Cooke Brewing Company, Chicago, 10 bales at 17 cents. Florida Brewing Company, Tampa, Florida, 10 bales at 17¼ cents. F. W. George & Company, New York, 10 bales at 16 cents. F. Sandkuhler, Baltimore, Maryland, 1 bale at 19 cents. Park Brewing Company, Providence, Rhode Island, 15 bales at 15 cents. F. W. McGowan, New York, 5 bales at 15 cents. Boston Beer Company, Boston, Massachusetts, 50 bales at 16 cents.

The COURT.—That price is so many cents per pound?

A. Yes. Eastern Brewing Company, Brooklyn, New York, 20 bales at 16 cents. Kuhlman Brewing Company, Ellenville, 10 bales at 16½. Those are all of the November sales. December sales: Bruyn-

(Testimony of E. Clemens Horst.)

donckx, London, 1 bale at 17¾ cents. F. W. George & Company, Milwaukee, Wisconsin, 25 bales at 15 cents. Lauer Brewing Company, Reading, Pennsylvania, 5 bales at 15 cents. Centerville Brewing Company, Cleveland, Ohio, 6 bales at 16½ cents. Consumers Brewing Company, Ohio, 5 bales at 17½ cents. Henderson Brewing Company, 20 bales at 14 cents. Medine Brewing Company, 15 bales at 17p cents. F. W. George & Company, New York, 2 bales at 14½ cents. J. Haffner, Lancaster, 92 bales at 16 cents. S. S. Steiner, New York, 44 bales at 14½ cents. Jefferson Brewing Company, Jefferson, Missouri, 4 bales at 16 cents. Mobile Brewing Company, Mobile, Alabama, 20 bales at 16 cents. Silverton Brewing Company, Silverton, Colorado, 6 bales at 18 cents. Centerville Brewing Company, Fort Wayne, Indiana, 10 bales at 17 cents. [73] Frostburg Brewing Company, Frostburg, Maryland, 3 bales at 18½ cents. Cleveland-Sandusky Brewing Company, Cleveland, Ohio, 97 bales at 16½ cents. Aurora Brewing Company, Aurora, Illinois, 85 bales at 16 cents. S. S. Steiner, New York, 33 bales at 16 cents. C. H. Atz, Egg Harbor, New Jersey, 6 bales at 16 cents.

The other four hundred and ninety-seven bales were used on sales that we had made previously, that is sales, we had made prior to November.

The COURT.—At what price?

A. The Cream City Brewing Company, Milwaukee, Wisconsin, 75 bales at 16½ cents. Gottfried Brewing Company, Chicago, 116 bales at 17 cents.

(Testimony of E. Clemens Horst.)

Cream City Brewing Company, Milwaukee, 8 bales at 17 cents. J. Hoheldel, Philadelphia, Pennsylvania, 10 bales at 20 cents; the same party 10 bales at 17 cents. Krautz Brewing Company, Findlay, Ohio, 15 bales at 15 cents. Eagle Brewing Company, Utica, New York, 100 bales at 17½ cents. United States Brewing Company, Chicago, 91 bales at 17 cents. All of those—they were sales for Pacific Coast hops, and these hops were delivered on those sales.

Q. What was your last sale of the hops rejected by the Pabst Brewing Company?

A. Practically all of them were cleaned up by the end of February—there were a few left at the end of February, 1913.

The price in February ran from 14 to 16½ cents. We endeavored to sell these hops to obtain the best market price.

I have had an account figured up without including San Francisco office expenses. I have not figured [74] anything for any selling expenses on those 497 bales that were delivered on prior contracts.

Mr. DEVLIN.—Do you know what was the fair market price, or what price could be obtained in the month of February, 1912, for hops, choice, air-dried Cosumnes hops, say at the end of February?

A. You could not sell that quantity, no matter what you took, unless you took some slaughtering figure.

Q. What would you estimate?

A. I would not say to sell that quantity of hops at

(Testimony of E. Clemens Horst.)

that time a person could not get over ten cents per pound.

Q. State what, in your opinion, was the reasonable price that you could have realized for the sale of 2000 bales of air-dried, choice Cosumnes hops, if sold in that quantity, in the month of February, 1913, at the nearest market.

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and being an improper question. The contract, if breached at all, was breached in November, and the sale should have taken place then. The question should be directed to a reasonable time after the alleged breach. Also that it does not detail the proper rule for the estimate for damages.

Mr. DEVLIN.—Please state what was the market price that could be obtained in the month of February, at the nearest market for that class of hops in February, 1913?

Mr. POWERS.—I object on the same ground.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #11.

A. Eleven to twelve cents per pound.

Nothing has been paid by the Pabst Brewing Company for their refusal to accept these hops. [75]

I have on hand samples of hops taken in September, 1912. They are not as good now as they were then. Because they have aged. Hops deteriorate in time. They ought to be kept in cold storage, and when they are taken out of cold storage they ought to

(Testimony of E. Clemens Horst.)

be used. You cannot take them out of cold storage and keep them. They usually spoil when taken out of cold storage.

These have not been in cold storage. These are duplicates of the samples we sent to the Pabst Brewing Company as samples of the hops we proposed to furnish them. They have been kept in the safe deposit vault in the Mercantile Trust Company's safe deposit vault, San Francisco, California. Mr. Lang had access to them. The package itself has not been sealed all the time. Mr. Lang is the only one that had access to the safe deposit vault. He sealed them and turned them over to me in the sealed package. That seal I have just broken. I have broken the package without breaking the *sale*, but the samples are sealed on cards.

They are in the same condition now as they were when they were taken out of the bales, except for the depreciation.

There has been no manipulation of them or handling of them at all.

The samples are numbered from one to twenty and twenty-five or thirty-eight, both inclusive.

One to twenty represent the first lot of samples which were sent to Pabst in September, 1912. [76]

Of hops grown on the Cosumnes. Twenty-five to thirty-eight was the second lot of samples that we sent them in October, 1912. They are not all Cosumnes air-dried hops. Among them are other hops. Because I was advised that they would not use Cosumnes hops. So I sent them some other samples.

(Testimony of E. Clemens Horst.)

Mr. Pabst and Mr. Zaumeyer said they would not use any more Cosumnes hops. Mr. Pabst was present in Milwaukee and Mr. Zaumeyer was in San Francisco. The conversation took place some time after the contract was made.

The conversation took place in San Francisco in July, 1912, a few months before the hops were harvested. They told me they would use nothing but Yakimas, New York State and Bohemian. [77]

[Testimony of Charles Zaumeyer, for Defendant.]

CHARLES ZAUMEYER was called for defendant out of order, and sworn and testified as follows:

Direct Examination by Mr. POWERS.

I have been connected with the Pabst Brewing Company for 29 years, as brewer and hop buyer and inspector, and had charge of their affairs in September, October and November, 1912. I received 20 samples from the Horst Company in October, 1912, and opened them for inspection, and they were put in a locker in the hop-house of the Pabst Brewing Company, in Milwaukee, Wisconsin. I myself was in charge of the locker and no one else had the key. I next saw the samples in March, 1913. They were opened for inspection by another party and put back into the same locker. They were not changed in any manner. I had the keys of the locker. I did not see the samples again until last week, when I submitted them to the officers taking the depositions in Milwaukee. They were turned over by me to the officers who took the deposition. They were then in the same

(Testimony of Charles Zaumeyer.)

condition as when I first saw them, so far as their physical appearance was concerned. On or about October 10th, 1912, I superintended the sending of 4 samples from the Pabst Brewing Company to the Horst Company. I retained portions of those samples. They are here with the other samples and have been given the same treatment as the 20 samples. Subsequently and on or about November 2d, 1912, we received another lot of samples from Mr. Horst, consisting of 14 samples. I gave them a thorough inspection and then I put them into the locker and they were accorded the same treatment as the other samples. I next saw the last two batches of samples, consisting of 4 and 14 each, in the month of March, 1913. They were then opened for inspection and put back into the locker and were not in that locker until last week when the deposition was taken in this case, and they were then taken by the officers who took the deposition and forwarded to this [78] court. So far as external appearance is concerned, there is no change whatever in the samples unless they are a little bit out of shape from handling. They may not be put up in as tight a package as they were before. The same identical papers are around them. None of these samples have been out of my sight until they were turned over to the officers except when they were in the locker. The contents of the samples have not been changed, with the exception merely, that they were inspected.

The witness then examined the samples and opened sample No. 9, and testified so far as the contents are

(Testimony of Charles Zaumeyer.)

concerned it is the very same thing in present appearance as it was when I saw it last. It was then offered for identification and the other 20 samples from 1 to 20 were then declared to be in identically the same external appearance.

WITNESS. (Continuing.) "They came in identically the same packages and no changes were made whatever. They are just the same as when they were received by us.

"The 4 samples that were sent by us to Mr. Horst were submitted to us by Mr. C. C. Sweeny. One-half of the sample was kept by us and one-half sent to Horst. They are in identically the same condition except that one-half of the sample was shipped to plaintiff. So far as the half retained by us is concerned, there is no difference whatever in the present condition from what they were when put in the locker."

The witness referred to Samples 21 to 24 inclusive, and testified that the contents were identical with the samples that were forwarded by them to Horst Company in October, 1912.

Witness then referred to the 14 samples received in October, 1912, to wit, samples 25 to 38 inclusive, and testified that they were identically the same package as received from E. Clemens Horst Company, as to the contents and containers.

"The hops are the identical hops that were in the packages, so [79] far as external appearance is concerned. I locked them up and had the only key."

With reference to sample No. 36, the witness testi-

(Testimony of Charles Zaumeyer.)

fied, "This sample is smaller than the others. The contents are the same except that we took off a few berries for inspection. I have also taken off a few berries from the rest of the samples. There was a uniform size through the rest of the samples, with the exception of 36. It was not the same amount as the others. The amount that is contained in the package now is practically the same as when we received it."

Q. Compare Sample 36 and 38 as to size. Is 36 a layer or complete section?

A. 36 is too small; it is split; just a few layers taken off the top of the sample. You cannot submit that to a brewer on any sale. It is not usual in the trade to submit such quantity as a sample.

Cross-examination by Mr. DEVLIN.

"I buy all the hops for the Pabst Brewing Company. I buy and sell for them. Have been engaged in that capacity for 17 years. The hops were placed in cold storage, freezing point, 30°. It is kept at that temperature all the year around. It may vary a degree up or down. These samples were kept in cold storage from the time the Pabst people received the same until last week, about a year and a half. They were taken out of cold storage a week ago yesterday, and were given to the officers taking the deposition. I saw the box in which they were contained, in Milwaukee and again this morning, but I did not see the hops until I came into the courtroom this morning. I had not seen the contents of these packages for a year and a half, until last week. All of them were opened up last week and exposed to a room, the tem-

(Testimony of Charles Zaumeyer.)

perature of which was about 70°. I do not know how they got to California. While they were in cold storage they were examined by two different parties, on two [80] different days, but they remained in cold storage while being examined. They were then opened about half an hour each time and were put back in the same packages each time. Nobody except the superintendent of the brewery has a key to the cold storage room. The day the deposition was taken I did not have my keys with me and I had to pry open the locker.

“Hops deteriorate by age in flavor and lupulin, when they are taken out of cold storage and exposed to the air. The color in those samples did not deteriorate any. If hops are taken out of cold storage and exposed directly to the air it would practically ruin them, but these were put into a package and sealed up and then they would not deteriorate. I do not think these hops have deteriorated in so short a time. I find them in about the same condition as they were a week ago, when I inspected them right out of cold storage. It does not at present look as if it made any difference to them. These particular samples are wrapped in tinfoil and cardboard and other paper on the outside, and it would preserve the hops longer than being entirely exposed to the air. The samples are made up in about the same style as they always make samples up. We keep them in cold storage because it preserves them in better shape. If they have not been put in cold storage they would have deteriorated with age and color. The fact that placing

(Testimony of Charles Zaumeyer.)

them in cold storage, would cause hops to spoil more rapidly when taken out than if they had not been placed in cold storage.”

Redirect Examination.

After these packages were opened up before the Notary Public, they were put back in the same package and put into this box and the packages were sealed and mailed. The blue containing wrapper was left in the very same condition as it is there to-day, folded right together again and wrapped up, and after the packages were closed with staples, they would not have contact with the air. When [81] they were taken out of cold storage and taken over to the Notary Public they were put back into cold storage.

Recross Examination.

During the noon-hour they were put into large mail bags. They were tied together in their original packages, and remained there until after dinner, when we took them out of the canvas bag again. The samples were then introduced in evidence for identification.

WITNESS (Continuing).—The condition of these packages are the same with the exception that a few berries are taken off of each sample for inspection, as at the time they were received from the Horst Company, except the four samples which we sent and one-half of those four samples are the same as those we sent to Horst, with possibly five or six berries taken off for inspection. The sample does not become any worse because I took off the bad berries and inspected them and looked at the inside. I know they are the same hops by the marks on the outside of the package.

[Testimony of P. C. Drescher, for Defendant.]

P. C. DRESCHER, called as a witness on behalf of Defendant, out of order, was sworn and testified as follows:

Direct Examination by Mr. POWERS.

I am a merchant and am engaged in the hop business, and have been for about forty years, and also grow hops and am familiar with the character and quality of hops grown in Sacramento County, and particularly in the Cosumnes District. I have bought and sold them for many years. I am now and for several years last past have been familiar with the market for hops grown in the Cosumnes District. I buy in California, and sell in California and throughout the United States. My purchases are all within California. In the year 1912, I was familiar with portions of the crop of the Cosumnes District hops grown that year. A choice Cosumnes hop, in my opinion, is a hop grown in the Cosumnes district, which is of sound condition in every respect, not slack dried or overdried, of proper [82] cure and good strength, or bright uniform color and cleanly picked. The flavor of the hop has to be of good strength and is represented by the lupulin in the hop. I am familiar with drying of hops, but I have never actually done the drying.

With reference to the price of choice Cosumnes hops during the month of November, 1912, the market price obtaining at that time was $17\frac{1}{2}\text{¢}$. That was the price from the dealer to the dealer. I could not answer as to the price of the dealer to the farmer. We

(Testimony of P. C. Drescher.)

did not happen to sell any hops to brewers at that time. It is difficult to say whether the price to brewers was less or more than to agents. Ordinarily the price to brewers is somewhat higher.

Mr. POWERS.—Q. The agents in turn sell to brewers after they buy, do they not?

The COURT.—You are asking about the price of an article we are not concerned with here at all. You are asking the price of choice Cosumnes hops. Now this contract calls for a specific article and you must confine your examination to that. We are dealing here with choice Cosumnes air-dried hops.

Mr. POWERS.—The intent of the parties as shown all the way through, was that at one time it was air-dried, and the next time they did not say air-dried.

The COURT.—Both telegrams, if you will read them say air-dried.

Mr. DEVLIN.—They set out the contract in the answer.

The COURT.—The whole controversy here is over choice air-dried Cosumnes hops. It is my duty to confine the inquiry to the matter that is in controversy here. The jury is not to be distracted by evidence that is not going to effect their judgment.

Mr. POWERS.—Q. With reference to Cosumnes hops, how are hops in the Cosumnes district dried?

A. By hot air. I have been there on the ground many times.

Q. With reference to air-dried Cosumnes hops, what was the market [83] value of air-dried Co-

(Testimony of P. C. Drescher.)

summes hops during the month of November, 1912?

A. $17\frac{1}{2}\phi$.

Q. What was the market value of choice air-dried Cosumnes hops during the season from November, 1912, to March, 1913?

A. The market price was between $17\frac{1}{2}\phi$ and 19ϕ .

Mr. DEVLIN.—For what?

A. For choice Cosumnes hops.

Mr. POWERS.—Q. Choice air-dried Cosumnes hops?

A. The term air-dried is not usually applied to hops. They are all dried by air.

The COURT.—You are arguing and not answering the question. Do you know what the market price was of that class of hops? That is all we are concerned with here. We are dealing with a contract that calls for a specific article.

A. From $17\frac{1}{2}\phi$ to 19ϕ .

Q. Would the market at that time for choice air-dried Cosumnes hops, take as high as 2,000 bales?

A. It would take as high as 2,000 bales. If they were offered at 10ϕ a pound in November, 1912, they would be taken up at once. If they were offered at 16ϕ a pound I believe it would not have taken to exceed a week or ten days. If offered at $16\frac{1}{2}\phi$ it may have taken a few days longer. It would depend on how actively anyone had offered them. There was a good demand for that class of hops. The proportion of choice hops in the season of 1912, was smaller than usual, owing to the fact of the crop having been damaged by rain towards the latter end of the picking sea-

(Testimony of P. C. Drescher.)

son. Rain turns them red and frequently makes them unfit for picking. It deteriorates the value greatly.

If all choice hops of one section are sold out, it makes the choice quality of another section in greater demand. The choice hops other than air-dried Cosumnes hops, were fairly well sold out during November, 1912. There was a good fair demand for choice air-dried [84] Cosumnes hops during the season from November, 1912, to March, 1913. The demand was stronger for choice hops at that time than for the lower grades.

Witness then examined samples 1 to 20, and referred to them as follows:

Sample 18 not clean picked. Sample 17 not a choice hop. Sample 16 in my judgment was not a choice hop, not cleanly picked. Sample 14 was not a choice hop. Sample does not give any indication of having been separated before. Sample 13 I do not consider a choice hop on account of its checkered color, and not being cleanly picked. Sample 11 was not cleanly picked. In some cases the age will give you a good idea as to clean picking. It was evident from the age of that sample that it was not cleanly picked. Sample 12 was not cleanly picked.

Witness testified that samples, 15, 9, 10, 1, 19, 5, 20, 8, 4, 7, 3, 6 and 2 were not cleanly picked. Sample 26 dirty picked. Sample 28 dirty picked. Sample 27 not cleanly picked. Sample 30 is not choice air-dried Cosumnes hop, is not cleanly picked. Sample 35 is badly picked. Sample 25 is not cleanly picked.

(Testimony of P. C. Drescher.)

Sample 38 is not cleanly picked, contains stems which are extraneous and which should not be in a choice hop. Those stems lower the grade of a hop very much. Sample 33 is not cleanly picked. Sample 32 is not cleanly picked. Sample 34 is not cleanly picked.

Mr. POWERS.—I show you sample 36 and ask you to examine it and say whether or not it is a complete sample.

A. This sample I am unable to tell anything about because it is very small and not sufficient to give any idea of the age of it. I would not be able to give you an opinion on that sample, because there is not sufficient of the sample to enable me to do so.

Sample 37 is not choice hops, owing to the leaves and not being cleanly picked. Sample 29 is not choice air-dried, not being cleanly picked.

Q. I show you sample 22 and ask you to examine it and say [85] whether or not in your opinion it is choice hops.

A. This sample is also too loose and broken to give a good opinion of judging. The general appearance of this sample is better, but is not as cleanly picked as it should be. With reference to sample 23, I would not consider it choice, although it is better than any of the other samples. With reference to sample 23. I do not consider sample 24 a choice to sample 23. I do not consider sample 25 equal to sample 23. I do not consider sample 24 a choice hop, but it is better than sample 25, and not as good as sample 23. Sample 25 would not be up to sample

(Testimony of P. C. Drescher.)

24. Sample 21 I do not regard as a choice hop. It is better than sample 25.

Q. Would the samples 25 to 38, referring to those in front of me here, be considered as a delivery under samples 21 to 24, as a basis?

Mr. DEVLIN.—I object to that as being suggestive and leading and calling for the conclusion of the witness. They must prove they are dried. He is asking him about certain hops that are not proved to be air-dried. The testimony is inadmissible.

Mr. POWERS.—There was introduced in evidence a letter of October 15th. Then we telegraphed an answer to that letter, saying we had forwarded four samples.

The COURT.—Were those samples air-dried hops?

Mr. POWERS.—No, sir. Our theory is that there was a modification of the contract. We gave him a broader latitude. We did not require him to furnish us air-dried hops. The contract of October 21st became modified by agreement.

The COURT.—It is for the jury to determine whether it was modified or not.

Mr. POWERS.—The question here is whether or not the samples sent are in accordance with those four samples.

The COURT.—Your theory is that it is admissible should the [86] jury find that the contract was modified.

Mr. POWERS.—Yes.

The COURT.—The Court will instruct the jury what is necessary to make a contract, and the jury will

(Testimony of P. C. Drescher.)

determine from the evidence whether a contract was made. The Court will also instruct the jury what would amount to a modification of that contract, and the jury will say whether it was modified or not, according to the evidence. The testimony is admissible.

A. In my opinion that would not be a good delivery because of the character and quality of these hops here sold by these samples. Whatever those numbers are they are equal to the quality of those later samples you have shown me.

Q. What is the custom between dealers and brewers in buying hops not yet grown where the agreement between the parties is silent as to time of delivery with reference to the custom of delivery, if any?

A. There is no custom of that kind to my knowledge. Unless stated to the contrary such deliveries are usually made as soon as the product is available. The spot market for 1912 crops would be affected for lower offerings for the 1913 crop to be delivered, affected by the crop condition and many other things.

Cross-examination by Mr. DEVLIN.

There is no such thing as a perfectly clean picked hop, without a single leaf in it. They all contain more or less leaves. In every sample I would expect to find more or less leaves. The amount of leaves that are allowed for a hop to be choice is required by experience in handling hops and determining their quality. There is no absolute standard. The quality is determined arbitrarily by what the eyes show. There is no percentage. Hops are never picked free

(Testimony of P. C. Drescher.)

from leaves commercially. If they were picked absolutely clean it would add considerably to the expense. The leaves are all the green color. The color is changed in drying. The leaves will [87] to some extent disappear. They will not be so visible. I have bought and sold Cosumnes hops. I do not know that there is any difference between air-dried and kiln-dried hops. All hops are dried by hot air. I made no distinction between air-dried and kiln-dried hops in answering Mr. Powers' questions. I have seen different appliances for drying hops. Practically all the machines I have seen were kiln driers. I have seen a machine different from the ordinary kiln on the Horst place at Wheatland. I do not know whether all the hops in the Cosumnes district were dried in one way or not. I make no distinction between air-dried and kiln-dried hops. I have studied the drying of hops for many years. The degree of heat varies according to the construction of the kilns, some of it between 120° and 150°. It is advisable not to have the air too hot. I have grown hops and bought and sold them. I sold some to Pabst Company in 1911 and 1912. I have contracts with them and with a number of growers in other cities. I am the agent here of the Pabst Brewing Company in the handling of its beer. My hops are sold to whoever will buy them, dealers and brewers. I imagine I sold a thousand bales between November, 1912, and March, 1913. On November 14th, we sold to Faulk-Wanzer 210 bales at 19¢, delivered in California, f. o. b. Sacramento; December 23, 1912,

(Testimony of P. C. Drescher.)

to Geo. A. Proctor, 200 bales at 17¢. January 4, 1913, to A. Magnus & Sons, 110 bales at 17½¢, January 4th, 78 bales at 17½¢. Feb. 7, 1913, 300 bales at 17½¢, and 321 bales at 18¢. Some of them were Cosumnes hops and some of them coast hops. 621 bales were Cosumnes hops. Between November, 1912, and March, 1913, I sold two orders to two different people. They were grown by Chalmers & Mahon. We intended to make a profit on those hops. I cannot say offhand whether we did or not. I don't think they were sold on a prior contract. There is considerable purchasing of hops in advance, tying them up for two or three or four years. There is a distinction between Oregon hops and Cosumnes hops. You generally can tell the difference. Our dealings [88] have been principally confined to California hops. I do not know as I can answer whether there is a difference between the price of choice Oregon and choice Cosumnes hops. The Russian River hops generally sell for less than the Cosumnes hops. I do not know of any grower making a practice of selling to brewers. I think we have a contract with Chalmers who is paid 15¢ on the contract. Some were bought in 1911 and some in 1912. I never sold 2,000 bales to any one customer. It is a very large order. I think 2,000 bales of choice Cosumnes hops in November, 1912, from the inquiries made at that time would have been sold in a reasonable time, I would say twenty or thirty days, depending on the efforts made to reach the market,—not for 20¢, but for 17½¢. I would place them in the hands of bro-

(Testimony of P. C. Drescher.)

kers in the different markets to draw from. Some in Chicago, New York, Boston, Milwaukee and St. Louis. I would employ brokers ordinarily in such a case. I cannot tell about the age of a hop by looking at it, but I can tell whether a hop is cleanly picked. It is more difficult to tell about these samples that are two years old, than if they were fresh, except as to the pick.

Redirect Examination.

In 1911 the prices were at one time up to a little over 40¢. They then commenced to fall off after the turn of the year 1912. The markets of the world were usually filled to meet requirements and were not desirous of buying ahead. The 1912 crop preserved the prices very much better and labor than the 1911 crop.

Recross-examination.

Some people will take more leaves than others will. To some extent it is a matter of opinion and taste. [89]

[**Testimony of E. Clemens Horst, for Plaintiff
(Recalled—Cross-examination).**]

E. CLEMENS HORST, recalled for cross-examination.

Cross-examination by Mr. POWERS.

I think there were a little over 3000 bales on hand on November, 1912.

Q. What steps, if any, did you take to set aside that 2000 bales for the Pabst people at that time?

Mr. DEVLIN.—I object to that as entirely irrelevant, incompetent and immaterial.

(Testimony of E. Clemens Horst.)

The COURT.—What time are you referring to?

Mr. POWERS.—On November 4th, 1912, when we told the Horst Company that we would not take them. I want to know whether he segregated the Pabst Company's hops at that time or not.

The COURT.—You may ask him if he was ready and willing to deliver those hops at that time or not.

Mr. POWERS.—Exception.

Exception #12.

Q. Did you when the Pabst people notified you they would not take these goods because of their quality, that it was not according to their understanding of the contract, set aside or take any steps to set aside or to use any marks or any indications that any portion of the 2900 bales was set aside for the Pabst people.

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #13.

Q. You testified that samples 25 to 38 were Cosumnes hops. I am right in that, am I not? [90]

A. I am not sure they were all Cosumnes hops. They were nearly all Cosumnes hops. Possibly they were all Cosumnes hops, but I am not sure that they were.

Q. Is there any way you have of refreshing your memory so that you could tell us?

A. Well, they were all air-dried. I do not think they were all Cosumnes hops. I could tell which

(Testimony of E. Clemens Horst.)

were Cosumnes hops by looking at the marks on the samples.

Q. Will you do so, please.

Mr. DEVLIN.—I object to that as entirely irrelevant, incompetent and immaterial. The only question is whether Mr. Horst here was able and willing to supply hops of the standard provided by the contract. The fact that he sent other samples is entirely immaterial in this case.

The COURT.—I think so.

Mr. POWERS.—My question is, were the 25 to 38 samples all Cosumnes hops, all air-dried Cosumnes hops, or were there other kinds of hops?

The COURT.—You received those samples?

Mr. POWERS.—Yes.

The COURT.—And you rejected them?

Mr. POWERS.—Yes.

The COURT.—The whole question is whether he was able to deliver 2000 bales of choice Cosumnes hops. That is all that is referred to here. If you had taken a different course, and had rejected them because they were not Cosumnes hops, that would be a different thing. The objection is sustained.

Mr. POWERS.—Exception.

Exception #14. [91]

Q. Did you have any other hops on hand save and except these 2900 bales of your own Cosumnes raised hops, with which to fill the contract that had been accepted?

Mr. DEVLIN.—I object to that because it appears that he had a sufficient quantity on hand.

(Testimony of E. Clemens Horst.)

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #15.

Mr. POWERS.—(Q.) You have testified on direct examination to the places where you sold 2000 bales of those Cosumnes hops. Where did you sell the other 900 bales that you had on hand at that time?

A. We used them on deliveries for choice Pacific Coast hops, on contracts that were made prior to November 4th. We got as high at 26¢ for some of them. Delivered in the east that would be about 22 cents, out here, about 24 cents out here. They were substantially of the same quality of hops. The contract called for a higher quality.

Mr. POWERS.—(Q.) With reference to the market for choice hops in November, 1912, and December, 1912, was the market for choice hops at that time a falling market or a stiff market.

A. The market was falling.

Q. Was it the same character of market for choice and for medium hops, at that time.

A. Whenever the market falls, it falls on everything, and when it goes up, it goes up on everything.

Mr. POWERS.—(Q.) If Sacramento hops are selling at 17½ cents and 18 cents and 19 cents, choice, in November, 1912, and December, 1912, to February, 1913, and certain other hops in the market also raised in Sacramento which could not [92] be distinguished from Cosumnes hops raised in Sacramento County from the external appearance,

(Testimony of E. Clemens Horst.)

are selling at 14, 15, 16 and 17 cents, would not that indicate that the last described hops were not choice hops. A. No, sir.

The difference between air drying and kiln drying—air-dried hops while superior in brewing qualities are generally inferior in appearance, generally speaking, because the leaves in air-dried hops do not dry up; they do not disappear in the drying process; consequently, from the general appearance, they would not be as salable. If a man judged only by appearance they would not be salable.

If you take California hops, you have got to start in with the hop-drying floor. That is the only place that you can tell the difference between air-dried and kiln-dried hops, if they are of equal picking.

Buyers see samples in their counting-houses.

Q. In that place it would be impossible to pick out which was kiln dried and which was air dried?

A. It depends upon the amounts of leaves in each. You have got to start in with the same class of hops, and then after you run them through the drying process, if you start in with the same class of hops, and then you dry them at different temperatures, or you use different methods of handling, then you see in the resultant sample a different rate of cleanliness.

Q. If you are shown two samples of hops in a counting-house in Chicago, or New York, you would be unable to say which was a kiln dried or which was an air-dried hop, according to your process?

A. No, I could not be sure of it. [93]

(Testimony of E. Clemens Horst.)

Mr. POWERS.—(Q.) With reference to the sale of hops to W. P. Downey, Montreal, Quebec, three bales at 17 cents, who made that sale?

A. That was made from New York.

Q. How do you know it?

A. From our books.

Q. It was reported to you by somebody else?

A. Yes, sir.

Q. How was it made?

A. I could not give you the details of that. I could not tell you.

Q. With reference to price, was that F. O. B. in cars on the coast or delivered at Montreal?

A. I can give you the full statement of my figures on that. I have not got that in my head. I have the vouchers right here.

The COURT.—Have you got the voucher for this sale he is asking about, or evidence of the transaction?

A. These are all the vouchers for that period from November to June, the selling period, for the New York office and the Chicago office. There is no possibility of applying any one voucher to any one sale.

Mr. POWERS.—(Q.) Then you do not know what money was spent in regard to the sale of goods in Montreal of your own knowledge?

A. No, I do not. I cannot connect the particular expenses with a particular sale.

Yes, sir.

I, myself had nothing to do with any of those sales, except running the business, that is all. I do

(Testimony of E. Clemens Horst.)

not carry in mind if the sale is made in Montreal. I am not in Montreal at the sale personally. [94]

Mr. POWERS.—(Q.) With reference to ~~this~~ sale in Montreal, at 17 cents, had there been any other transaction between Mr. Downey and yourself that year?

A. I have got the statement of all the business between those statements. I have got the statement with me of every sale that was made of Cosumnes hops, as well as all other hops, from the 5th of November to the end of June.

I cannot tell you whether I made any other sale to him or not unless I look at that statement, then I would only know as to that period.

Q. Was this price made to Mr. Downey a special price in order to make up for some other transaction you had with him?

A. No. Every sale we make is independent. It stands on its own feet. There was no selling one lot for another. Nothing of that sort.

Q. How do you know with reference to this Downey sale, whether or not that was the fact?

A. I know we would not sell two lots of hops, and have one hop sell another. We would not do that.

Q. How do you know that was not done in this particular transaction?

A. I know we have not done it. I do not know of any other way to tell you.

I was not present.

Q. You do not know of the sale except that it was reported to you?

(Testimony of E. Clemens Horst.)

A. That is all.

With reference to the goods shipped to Gottfried Brewing Company in Chicago, I cannot tell you whether [95] any of them were rejected or not. The Gottfried Brewing Company rejects hops every year.

I do not know that we delivered any Cosumnes hops to them. Gottfried has rejected hops every year since I have done business with him.

We had a contract with the United States Brewing Company of Chicago to deliver them Pacific Coast hops at 17 cents. They accepted some Cosumnes hops under that contract and rejected some. Those rejections and complaints were all prior to November 5th.

Q. They were all the same character of hops as those that you subsequently tendered to Pabst?

A. They were all choice hops.

Q. What became of those rejections?

A. Those people kept them. They simply made me make an allowance. They held me up. Whenever made an allowance they are not charged up. These allowances that we made were all made prior to November 5th, and they had nothing to do with the 3000 bales.

They were substantially the same class of goods, and where one man could not take them at 12, another man would take them at 15 cents. I have a contract with the Atlas Brewing Company for the last ten or fifteen years at various prices. I cannot tell you what contracts we had on hand at that date.

(Testimony of E. Clemens Horst.)

A. With the exception of 150 bales, all the rest of the bales are of equal grade. They were all choice grade, every bale. One bale was substantially as good as the other. They were not of the same kind. They varied.

Q. Well, they were all of the same kind, were they? [96]

A. No, not of the same kind. They varied. We did not pick them all the same day. You are picking hops about three weeks, and the hops you are picking the first day are not identical with the hops you are picking the second day.

Q. They are choice? A. They were choice, yes.

Q. They were all of the same degree of choiceness?

A. Yes. But they were all of the same degree of choiceness. There was no rain during the time we were picking hops. We were one of the few people that got through before the rain. It took about three or four weeks to pick about 4500 bales. We used a machine. We started in picking the ripest first, then went along and by the time we got them picked, the hops were no riper at the end than the hops we started to pick at the beginning. The hops you pick in the early part of the season sometimes are green, but not always. It sometimes happens that the hops you pick on the first day are the ripest, and the greenest hops you pick on the last day. The conditions being the same on our land as the conditions on other people's land, our hops ripen substantially as other people's ripen.

(Testimony of E. Clemens Horst.)

There was the same possibility of other people's hops ripening rapidly as ours.

Q. Did you ever know of a crop of hops picked on anybody else's land of over 4500 bales where the crop was uniform in quality throughout, before?

A. Why, yes.

Q. Where?

A. There is no reason why they should not be uniform.

Q. The entire crop?

A. If the hops are picked uniformly.

Q. You think they would be of uniform quality?

A. What do you mean by uniform quality?

Q. Uniform in quality?

A. Equal quality, or identical.

Q. You say uniform in quality?

A. Yes, a crop may be uniform in quality. Simply the skill in picking and drying them makes uniformity in quality.

Q. You had the only machine-picked hops in the market? A. Yes. [97]

We had the only air-dried hops on the market, that is hops that were dried by outside blast, except the plant belonging to Pabst Brewing Company in Wisconsin. There was no other operated in Sacramento County. The only difference between our process of drying and the kiln process of drying is in the kiln dried you dry your hops at a warmer temperature than you do with our dryer. They are all dried in the house. They are all dried by applications of hot air in the house and our process it is

(Testimony of E. Clemens Horst.)

hot air generated and passed in and in the other case, it is hot air created by stoves or furnaces on the inside. Choice hops are the best hops in the district that you refer to.

Q. What are the qualities of a choice Cosumnes hop?

A. Soundness, properly cured, cleanly picked, good color, freedom from disease, freedom from mould, freedom from any form of damage. Lupulin also plays a part. It is grown in the hop, and whether or not it is, is determined by looking at it. Our contract provides for 2000 bales of Cosumnes air-dried hops. We were the only persons who grew air-dried hops.

Q. Then according to your interpretation of that contract, the best of that crop during the year 1912, would have to be accepted by Pabst in compliance with your contract, whether they were choice hops or not?

A. If the hops were sound, if the hops had no faults. I would not intend if the hops were dirty, or the hops were damaged, or poorly dried or picked, or bad in any other way, that they would be choice hops.

Q. They had to be the general quality of choice Cosumnes hops?

A. Choice air-dried Cosumnes hops.

Q. Air drying and kiln drying both produce a hop, but they are simply different methods of preparing them for market? [98]

A. When you get right down to it one hop is as

(Testimony of E. Clemens Horst.)

good as another hop for brewing. You simply put them on a market, and you give a man what he wants. Air drying refers to the process by which the hop is cured.

Q. It does not refer then, to the finished product?

A. Air-dried Cosumnes hop. You confine yourself to that particular locality.

Q. You could take an air drying plant and establish it anywhere you wanted to?

A. Yes, you could in time.

Q. When you speak about air drying it provides for the manner in which the crop is cured?

A. It refers to the manner of curing the crop.

The COURT.—In other words, air drying does not refer to the particular character of the hop that is grown?

A. No, sir.

Q. It simply refers to the mode or method or manner of curing it? A. That is all.

My estimate of the difference in value of air-dried as distinguished from kiln-dried, was the result of the qualities being better preserved by the air drying than by the kiln drying. It is better. It is hard to get anybody else to see it. That is the trouble. I cannot tell the difference between air-dried Cosumnes and kiln-dried Cosumnes hops after they are dried. To look at them you could not see the difference.

We do not get a higher price for air dried than we do for kiln dried. In fact we are at a disadvantage in selling air dried, because we cannot sell them

(Testimony of E. Clemens Horst.)

to the dealers. They won't sell them for us. We have to go to the brewers, and we are set out of a considerable on that account. As soon as a hop is known to be air dried, why, we cannot get the dealers to buy them. They will not handle our product, because they market their own hops themselves. [99] They market their hops direct to the brewers themselves. Each hop dealer has a trade, and we have to sell our hops to the brewers, because the dealers will not buy our goods. We sell our hops to the brewers,—the dealers naturally won't buy ours because they are advertising our business. They feel that they are making business for us; therefore, it is harder for us to sell air-dried hops than it is kiln-dried hops.

Q. You say as an expert that when a crop for future delivery of hops, not then grown, is entered into, that is the universal custom to consider that it is at the dealer's option in regard to when they are to be delivered, is that right? A. Yes.

Q. Is there any variation from that?

A. Never. That is, within a reasonable time. I do not say it is at the seller's option to deliver them at any time he pleases. I said within a reasonable time. I say within the shipping season. From the time of picking until the end of February.

Q. Why did you send to the Pabst people a form of contract, after this telegram, for deliveries from September to December?

A. Because on the 1911, that I made at the same time, Pabst was asking us to make the shipment of

(Testimony of E. Clemens Horst.)

the 1911 crop from August until the end of December. They specified that time in the 1911 and because they had done that, I specified the same time in the 1912 crop sale.

Q. Did you furnish them samples in 1911 before shipment?

A. I presume I did. I do not know whether I did or not. It was not customary to send samples before shipment of the goods. I never sold the Pabst people any hops before those two lots.

Q. Did not you sell Pabst some hops in 1906?

A. I think I did. I think I sold them a hundred and fifty bales in 1906.

Q. Did you send them samples at that time?

A. I cannot remember, [100] 1906. I sold Pabst three lots of hops. One lot of 150 bales, a good many years ago. I do not know what year it was. Then 500 bales in 1911 and 2000 in 1912.

After I sent the wire to the Pabst people reading, "If you wire you will accept the hops quality samples you send, we will arrange accumulate such hops for you," I received the four samples marked 21-22-23 and 24. Two came in one mail and two came the next day. I subsequently shipped them samples of hops thus marked 25 to 38, that I considered to be in conformity with these four samples of hops. All these 14 samples of the second lot shipped were the same size. Substantially the same size, as these samples here. One sample might cover the sale of 1000 bales or 5000 bales. No matter what the quantity of the hops were they could all be represented by one sam-

(Testimony of E. Clemens Horst.)

ple by showing their quality, if you were to send samples at all. If you have one sample you can inspect a thousand bales with it. The sample is to represent the character and quality of the goods that you tender for sale. The buyer does not have to wear out the sample comparing it. It is not the custom of the trade to deliver one sample for not exceeding one hundred bales. I never shipped any of our Cosumnes hops choice by fruit express. I do not know of any freight more rapid than any other freight in the line of shipping here.

The brewers did not lay in stocks of hops in 1911 on account of short crop. They had tough sledding to get along until the 1912 season. During the 1912 season they had a crop and a half, too many of them in 1912.

Q. And as a consequence brewers wanted choice hops?

A. They wanted any kind of hops. They wanted hops.

As far as the four samples which I received from the Pabst people, they are in the same condition now as when received by us. [101] No portions of them have been taken off. Mr. Lang who is in our employ has possession of them in the safe deposit vault. Witness is shown a draft of the contract signed E. C. Horst Company by E. C. Horst.

Q. Will you explain how you happened to send that draft of contract to the Pabst people referring to this thousand bales, deliveries September to December, if that was the universal custom to make deliveries of

(Testimony of E. Clemens Horst.)

the crop to the following March?

A. I made an exception in this case because of that concurrent sale of 1911; wherein Pabst indicated deliveries by the end of December, so I made this contract the same way. I thought that I had a longer time to deliver, but I was satisfied to limit my time to December. I thought the Pabst people might prefer it. They informed us of their wishes in another telegaram and I wished to conform to their wishes.

Q. Subsequently did the Pabst Brewing Company send you another order of which this is a copy with the exception of the lead pencil writing? A. Yes.

Mr. POWERS.—We offer it in evidence.

The Pabst people did not accept and forward any hop contract in accordance with the printed form, which we had forwarded them.

The said draft of contract was and is in the words and figures following:

PURCHASE ORDER.	No. 54808
PABST BREWING CO.,	Req. " C. Z.
	Dept.

Milwaukee, Wis., Sept. 8, 1911.

E. Clemens Horst Co.,

San Francisco, Cal.

Please forward the following to Chestnut St. Depot Via C. M. & St. P. These goods must reach us. Shipments to be made during October, November, December, January and February. [102]

2000 bales choice air-dried Cosumne California Hops, Crop 1912, at 20¢ per pound f. o. b. Coast.

We insist on submission of samples and approval

(Testimony of E. Clemens Horst.)

thereof before shipments are made.

Mail bill at once, putting PURCHASE ORDER NUMBER thereon. Also mail BILL OF LADING with weight and through freight rate. All goods are received subject to our count or weight and inspection. Terms: Cash, less 2% 10 days after goods are delivered or on or before 10th of month following purchase; otherwise settlements are made on the 22nd of each month following purchase of goods. All freight charges must be prepaid.

If you cannot ship so that goods will reach us on the day specified above, notify us at once, giving date on which you can ship.

PABST BREWING CO.

H. J. STARK,

Secretary.

In one of our letters with reference to 1500 bales of hops to customer in the Middle West. This was the Schlitz Brewing Company. We did not sell the Schlitz Brewing Company Sacramento hops. We sold Schlitz higher grade hops. We delivered those hops, 1200 bales, and they were on a higher contract, a contract for a higher grade than Sacramento.

Q. Then this statement that you delivered in accordance with samples 25 to 38 is not correct?

A. Yes, it is correct.

The COURT.—That is sufficient on that subject. That is purely collateral.

I do not think we sold Cosumnes hops to anybody else but Pabst. We sold Pacific Coast and then delivered Cosumnes on that contract.

(Testimony of E. Clemens Horst.)

They were the only hops we sold as Cosumnes. We sold the others Pacific Coast hops.

I can give you a list of the people to whom we delivered the last 2000 bales. I have not got that in my head. I had 2900 bales at the time the Pabst people defaulted. [103]

I could not tell you how many hundred bales there were in November on hand of Cosumnes grown by other growers.

There were about 9000 bales grown in the Cosumnes District.

There might have been 500 bales or 200 bales or a thousand bales. I would not think as many as 1000 bales.

I never heard of any sales of choice Cosumnes at 18¾ per pound f. o. b. coast, or of 19¢ a pound.

Q. If you had choice Cosumnes hops on hand you could have gotten just as good a figure as anybody else with choice Cosumnes, could you not?

A. I cannot sell them as well as other people. These people that sell the hops, they generally deal in business with friends, and they travel on their own account in the east and have their own limited number of friends, and they get a fancy price, and we do not because we have to sell through employees. And even if we sold at a less figure we could not sell our hops. In my opinion samples 25 to 38 are choice. There is a difference in them but they are all choice, and are as choice in quality as samples 21 to 24, and are substantially the same grade of hops.

Q. When is a choice hops to be rejected because of

(Testimony of E. Clemens Horst.)

the manner of picking so far as it being dirty or clean?

A. When there is an excess of extraneous matter, then it ceases to be choice. That is to be determined by any familiar with the hop growing. People who are competent to distinguish must use their own judgment as to whether or not the amount of extraneous matter present is sufficient to prevent it from being a choice hop. The grading of hops is like the grading of other commodities, such as wheat, and things of that kind, and with hops, the picking, packing and curing has a great deal to do with them. The Pabst people sent me the samples and then I matched them and tendered them the hops and they could not tell the hops thus tendered from [104] any other samples they had sent me. Machine-picked hops do not bring a larger price than hand-picked hops. The clean hand-picked hop is as clean as the machine-picked hop. The Horst crops could be sold by us if we would hire salesmen and pay them a high enough salary. The salesmen stand up for fancy salaries and we better sell hops cheaper and do away with a fancy salesman.

Q. If other dealers could sell hops for 19¢ in February, 1912, choice Cosumnes, was there any reason why you could not sell choice Cosumnes?

A. I do not know what the particular wants of the particular buyer may have been, or what sort of a sale of hops it might have been. A man might buy hops at 30¢ and another man might buy hops for 19¢ when the hops may have been 13¢.

(Testimony of E. Clemens Horst.)

Q. Where there are two lots of hops, equal in quality one Horst-grown and one grown by somebody else, if the price of the Horst-grown hop was $\frac{1}{2}\text{¢}$ less than the other, would not the Horst-grown hop get the benefit of that sale?

A. No, not if there was 2¢ difference. Hops are an article that are not sent to market like anything else. A man will travel around sometimes for a week, or two or three or four weeks and not sell a bale of hops. He will have to make friends to sell them. It is not an article that is marketed like an ordinary article such as hay and barley, or wheat, or anything of that sort. There were buyers in the Sacramento market for choice Cosumnes hops from November, 1911, to March, 1912, if you could find them. The dealers would not buy from us. We did not send any hops east earlier than usual that season. You could not sell 2000 bales of Sacramento hops or Cosumnes hops, or any other kind of California hops during that time except at a forced sale. It does not make any difference what the price was, we have to find a customer. Even if it was lower than the price of others you could not sell hops in that amount. They would not buy them. F. W. George & Company, S. S. Steiner, [105] Smith & Capron, L. G. Jacks, Bauer Schweitzer Company, are all dealers.

Q. Then you were mistaken the other day when you said dealers would not buy your hops?

A. Unless they get them dirt cheap they will not buy them from me the same as they will from some other people.

(Testimony of E. Clemens Horst.)

Q. The Henderson Brewing Company is not a dealer? A. No, sir.

Q. Why did you sell to the Henderson Brewing Company for 14 cents when you sold to Mr. George for 16 cents, and to Mr. Steiner for 14½ cents?

A. We took whatever we could get as fast as we could get it.

Q. It did not require salesmen to go around the country in order to take whatever you could get, any price you could get?

A. It was hard to unload it.

Q. Was it necessary to maintain an office in New York and a man with a salary of five hundred dollars a month in order to dispose of these goods in the manner you have testified?

A. We did not hire that man for that purpose. We had a man there. He sold those hops and the expenses were apportioned.

Q. As a matter of fact, was not that manager of your New York office up in Montreal and spent a great portion of his time trying to sell goods up there in November, 1912?

A. They were travelling around all the time. We took the expenses they incurred in travelling around all the time and apportioned them. All of the time they were trying to sell these hops.

Mr. POWERS.—I move that the answer be stricken out as not responsive to the question.

The COURT.—The answer is quite responsive to the question.

(Testimony of E. Clemens Horst.)

Mr. POWERS.—Exception.

Exception #16. [106]

There was no hope of selling Pabst goods at a profit in Canada because of a tariff. When our men went into Canada they did not go there with the idea of attempting to sell Pabst goods. We shipped one bale to London early in December as we wanted to sell the hops on the European continent. The continental buyers buy in London. We sent a sample bale over there to the market. We maintain an office in London and sell a large quantity of hops there, but we did not charge up any London expenses. We sell some hops in England through the London office, but the bulk of them are sold on the continent through the London office. The reasonable allowance to a broker for making a sale of hops in November and December, 1912, was $11\frac{1}{2}\text{¢}$ a pound. We pay from 1 cent to $11\frac{1}{2}$ cents. On a cent a pound, we pay the expenses. On a cent and a half a pound, we expect the man to pay the expenses. I do not recollect who it was I hired at $11\frac{1}{2}$ cents. Brokers that sell between dealers and dealers get one-half a cent, and some of them get only one-quarter of a cent. These brokers that do business between the farmer and dealer, they get one-half a cent. Some of them get three-quarters of a cent. Brokers contract for the same price in selling for the dealers as they do for the grower, but we cannot get the broker to sell our hops to other dealers. One and a half cents a pound was a reasonable allowance to make to a broker for the sale of hops in 1912 in

(Testimony of E. Clemens Horst.)

selling them to brewers. E. C. Horst Company sold 300 bales of hops of equal or better quality than the early California choice hops of 1912.

Q. Did you use Cosumnes hops to fill that contract, or any part of it?

A. I do not know as I can give you the data for that. We did not pick this crop of Cosumnes hops extra early in order to fill that order. We started to pick on the 12th day of August, and we stopped picking on the 7th day of September. We picked only a few [107] hops the last few days of the season. I have got the detail of each day's picking.

We do not weigh hops at all. We simply guess at what the weights are. This is green weight. It takes about three and a half pounds of green hops to make one pound of dried hops. All of those estimates there are in green weight. We picked between twenty-one and twenty-two thousand pounds on August 12th. That is 200 pounds of the 21,000 pounds. We picked off a few hops from the vines after they had gone through the machine.

On August 13th, we picked 49,000 pounds and 1075 pounds were picked by hand. The next day we picked 104,000 pounds. 2400 pounds of those were hand-picked:

Date.	No. of pounds picked by machine.	No. of pounds picked by hand.
August 12th:	21,626	244
August 13th:	48,099	1175
August 14th:	98,573	2515
August 15th:	77,094	2185
August 16th:	102,647	1771
August 17th:	103,215	2343

(Testimony of E. Clemens Horst.)

Date.	No. of pounds picked by machine.	No. of pounds picked by hand.
August 18th:	98,898	1756
August 19th:	97,838	2326
August 20th:	103,236	2339
August 21st:	96,932	3292
August 22nd:	87,033	9945
August 23rd:	73,521	5940
August 24th:	114,262	4479
August 25th:	102,305	4505
August 26th:	106,757	4652
August 27th:	94,787	5189
August 28th:	126,577	5510
August 29th:	129,772	5626
August 30th:	137,529	3831
August 31st:	129,376	5104
Sept. 1st:	123,435	4850
Sept. 2nd:	113,276	6422
Sept. 3rd:	95,625	3057
Sept. 4th:	60,013	
Sept. 5th:	49,410	
Sept. 6th:	22,581	
Sept. 7th:	24,300	

There was another contract with the Manhattan Brewing Company, where we agreed to sell 100 bales of hops equal to or better than early choice California hops of 1912 at 27 cents a pound. [108]

We made an allowance to the Schlitz Brewing Company for two carloads out of the 1200 bales.

Q. And you made the allowance because of the quality? A. No, because of policy.

The New York office took care of the rejections of other goods than Cosumnes hops and of all other

(Testimony of E. Clemens Horst.)

business. Everything that was pertaining to our business they took care of there.

I did not know personally what was done by each man when he went out on a trip other than by the knowledge I gained from what he told me.

Redirect Examination.

Please state whether an expert could form a fair and accurate opinion as to the quality of hops of 1912 by the samples now in the courtroom, in their present condition.

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, calling for the conclusion of the witness, and argumentative.

The COURT.—Objection overruled.

A. No, sir. Because the samples have aged and they are mussed up. The hops deteriorate with age and mussing hurts their general appearance and you see the leaves more in a sample that is mussed up than you would otherwise.

Q. Would you as an expert undertake to say what the quality of the hops was in 1912 by an inspection of these two samples after two years?

Mr. Powers.—That is objected to as irrelevant, incompetent and immaterial, and in no way intending to impeach the opinion of our expert. It is irrelevant, incompetent and immaterial, calling for the conclusion of a witness on matter that is now the subject of expert testimony. [109]

The COURT.—Objection overruled. Exception.

Exception #17.

A. Well, you can see that the hops are now no

(Testimony of E. Clemens Horst.)

worse than the samples indicate.

Mr. DEVLIN.—(Q.) Would the samples have to be kept, preserved in order to give the Court and the jury a fair indication of what the hops were two years ago that these samples were supposed to represent?

Mr. POWERS.—Same objection.

The COURT.—I will overrule the objection.

A. Samples should be kept tightly wrapped and properly handled and not mussed up. It makes them look poorer. Some of them have been split, that helps muss up the sample. In taking samples you try to show the character of the hops. Hops are not uniform all through the bale as to leaves. There is a variety of hops called fancy, which is better than the choice hops, but there is no such thing as a perfect hop. Samples one to twenty are the same class of hops as 21 to 24. They are mussed up. Samples 25 to 38 are so mussed up that they would not enable an expert to judge with any degree of accuracy what the original condition of the hops was, because the samples are aged and have not been properly kept. We retained duplicate of the samples we sent to the Pabst Brewing Company. They are numbered the same. Hops taken out of cold storage would immediately deteriorate.

Q. If you were undertaking to pass upon the quality of hops of 1912, would you as an expert consider it fair to take samples of hops that have been kept in cold storage for eighteen months or so, taken out of cold storage and transmitted on a journey of three

(Testimony of E. Clemens Horst.)

thousand miles in a railroad car and that have been handled from time to time, broken up and mussed up.

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, calling for the conclusion of the witness upon a matter [110] which is not the subject of expert testimony, and argumentative.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #18.

A. Samples kept under those conditions cannot be properly judged or fairly judged. The soundness of hops is produced by drying and curing. The factors which go to make up the value of a hop are the district in which it is grown, the time of picking, the proper picking as to the season, and the fatness and fullness of the hop. Its freedom from spider damage, its freedom from louse, and freedom from discoloration. Freedom from curing defects or baling defects. Proper picking. Curing includes drying. It is impossible to get any hops that do not contain more or less leaves.

Hops have volatile oils and these volatile oils will disappear with age.

The word choice hop is an elastic term.

Where one grade runs into another is a doubtful point. There is a range between grades of hops. Pacific Coast hops are generally considered of better quality than Cosumnes hops. It means the first average quality of the Pacific Coast, and a better quality of hops than if I sold to you choice Cosumnes

(Testimony of E. Clemens Horst.)

hops. Because they have a wider range to pick from.

Mr. DEVLIN.—Q. The Pacific Coast quality raises the quality of the hop, whereas the Cosumnes' hop may lower the quality of the hop. The point here is whether Cosumnes hops as a grade of hops, are lower or higher than the average Pacific Coast grade.

A. Cosumnes hops are the same grade—some Sacramento hops are low-grade hops, lower grade hops than Pacific Coast hops. Soil and climatic conditions.

Russian River hops are considered very high, in the hop grade. The highest grades are Yakimas, Russian River, then Oregon and Sonomas, then Western Washington, then Yuba County [111] and Yolo County, are higher than Sacramento.

[Testimony of Paul E. Peterson, for Plaintiff.]

PAUL E. PETERSON testified as follows:

Direct Examination By Mr. DEVLIN.

I reside on the Cosumnes River. I am a hop grower. Have been in the business for twenty-five years. Have been engaged in Sacramento and Yolo Counties. My land is in the Cosumnes District near the land of the plaintiff. Am familiar with the supervision and care-taking of hops. First grew them in 1912. Did not see the 1911 crop. I have sold hops. Generally sell my hops as choice hops. I consider a choice hop to be one that is fully matured, fully cured, properly handled and not over

(Testimony of Paul E. Peterson.)

ripe. There are some hops known as fancy hops.

Q. Say out of 2,000 bales, would choice hops be the best bale out of 2,000 or the average bale?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness, on a matter that is not the subject of expert testimony.

The COURT.—The objection goes to its weight and not to its admissibility. It is for the jury to determine the value of his knowledge, but it is entitled to go to them.

Mr. POWERS.—Exception.

Exception #19.

A. It would be the average bale. I remember about a year ago last October that certain samples of hops were submitted to me from the Cosumnes district. I examined certain samples in the courtroom. I can tell whether they are well picked according to the age of the hops.

Q. Explain to the Court and the jury how age affects the question.

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial, calling for the conclusion of the witness on a matter [112] that does not affect the issues of this case.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #20.

A. It affects the flavor and looks of them. You cannot tell whether they are cured properly or the quality of the hops. You can tell whether they are

(Testimony of Paul E. Peterson.)

well picked, that is all. You can tell as to their picking by the appearance.

Q. I show you twenty samples of hops introduced in evidence, being numbered one to twenty, sent by E. Clemens Horst Company to the Pabst Brewing Company. You saw them at noon to-day. Look at them again if you desire to, and state to the jury whether you consider them in your opinion as choice hops?

Mr. POWERS.—I object to that as calling for the conclusion of the witness on a matter he is not shown to be an expert in.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #21.

A. I consider them prime to choice.

Q. Would you consider them as good as your hops of the same year?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness.

The COURT.—You may ask him if he regards them as hops of the grade he has stated, prime to choice of that season.

Q. Do you regard them as choice hops of the season of 1912.

A. Yes. All hops in picking contain more or less leaves.

Q. Is it practical commercially to pick hops so that there will not be any leaves in the hops?

Mr. POWERS.—I object to that as irrelevant, in-

(Testimony of Paul E. Peterson.)

competent and immaterial, and calling for the conclusion of the witness on a matter he is not to be proven expert in. [113]

The COURT.—Objection overruled.

Exception.

Exception #22.

It is practically impossible to pick hops without leaves or stems. I do not think there is undue proportion of leaves in these samples. I cannot tell as to their color or flavor now because the hops are too old. I recognize my initials on the back of sample #11. as the sample I examined in October last.

Q. Were they of good flavor and good color?

Mr. POWERS.—I object to that on the ground that the witness has not been shown to be an expert of such a character as to recognize those qualities in hops.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #23.

Q. What did you find the character of the hop to be as being a choice hop, its flavor, quality of picking, cure and so forth?

Mr. POWERS.—Same objection.

Same ruling.

Mr. POWERS.

Exception #24.

A. Choice Cosumnes hops. The flavor was fine. The picking was good. (The witness testified the same as to samples 17 to 18.)

Q. What did you find it to be?

(Testimony of Paul E. Peterson.)

Mr. POWERS.—This is all subject to my objection.

Mr. DEVLIN.—Yes.

I show you samples 25 to 38; state whether they are choice hops.

A. They are choice Cosumnes hops.

Q. Do they bear an undue proportion of leaves or a fair proportion?

A. Yes, an average proportion. [114]

Mr. POWERS.—This is all subject to my same objection and exception.

Mr. DEVLIN.—One objection and exception is as good as twenty.

The COURT.—It is all on the ground that he is not shown to be an expert.

Cross-examination by Mr. POWERS.

I do not pretend to be a hop expert. My knowledge of hops has been gained by raising and selling them for about 25 years, and about three years in the Cosumnes district. I have never bought hops for market. My experience has been gained by growing hops and getting them ready for the market. If a hop was otherwise good and was dirty picked, it would be rejected as not a choice hop.

Q. Leaves and stems or any other deleterious matter is called dirty picking? A. Yes.

Witness is shown samples 38. State whether or not you consider that a clean pick?

A. There is a stem in there that should not be there, but that may have been an accident. I would

(Testimony of Paul E. Peterson.)

prefer to see another sample of two.

The COURT.—Take that sample as a whole. Would you say it was *cleaned* picked or not?

A. I think it is. I have figured that all hops with as much as six or seven per cent of leaves and stems are clean picked.

Q. If it has got at least six or seven per cent leaves or stems you still consider it a choice hop?

A. Yes, I would consider it a good average choice hop. I sold my hops that year for 22 cents. There were some hops of that character sold that year in November, but I do not remember. I am not a hop buyer, so could not tell. There may have been some sold.

That is all. [115]

[**Testimony of E. Clemens Horst, for Plaintiff
(Recalled).]**

E. CLEMENS HORST on further redirect examination.

When it comes to selling hops it is very hard to find buyers at any time of the year because there are so many people in the business. I had a conversation with Mr. Pabst in regard to selling our contract in Milwaukee, in December, 1911. He wanted to know that the market was for Cosumnes hops. I told him 27¢. He said: "I will sell you back 2,000 bales at 27 cents." I told him we were selling for 27¢ and buying for 25¢ and he said he did not want to sell for 25¢. He told me he was not going to use Cosumnes hops. He said they were going to confine their hop purchases to Bohemian and Yakimas and New York

(Testimony of E. Clemens Horst.)

State and that he wanted me to tell him at what price we would buy back the 2,000 bale contract. He said they might use 500 bales, but he wanted to sell at least 1,500. At that time he asked either 23 or 24¢. I told him that that price was beyond the market and we could not trade. The market at that time was 20 or 21 cents, and still dropping.

Q. Now, you were asked some questions this morning about rejection of hops. I was going to ask you some questions, but have reserved them for redirect examination as to what your experience has been with brewers rejecting hops, and about the policy of your business and so on.

Mr. POWERS.—I object to that as immaterial and not redirect examination.

The COURT.—I think that is a very general question. It is something that he has gone over once or twice. He has said at least twice that rejection occurred with almost every brewer that he had done business with.

The COURT.—Take the Schlitz transaction. That was a transaction calling for 1,500 bales. There were some rejections, you said? A. Yes. [116]

Q. They claimed a rebate and took 1,200 bales?

A. Yes.

Y. You allowed a rebate on 200 bales? A. Yes.

Q. They kept the 200 bales, but asked a rebate?

A. Yes. I cannot say any more than that I offered to take the hops back and they said as they had them already in their brewery, they would rather keep them there and have an allowance on them. I

(Testimony of E. Clemens Horst.)

made that allowance as a matter of policy. I have made a tabulated statement of the Government's report as to the quantity of hops raised in 1911 and 1912.

Mr. POWERS.—We object to that as irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Exception.

The world's hop crop was 149,000,000 pounds, and in 1912 it was 221,000,000 pounds. To be exact, in 1911, 149,800,000 pounds, and in 1912, 220,900,000 pounds.

Mr. DEVLIN.—Pretty near twice as great in 1912.

A. 50% larger.

Q. What was the product in the United States in 1911 and 1912?

Mr. POWERS.—I make the same objection to that.

The COURT.—Same ruling.

Mr. POWERS.—Exception.

Exception #25.

In 1911, in the United States it was 44,000,000 pounds, and in 1912, 55,800,000.

Recross-examination.

The duplicates were substantially in the same condition as the duplicates produced by defendant. I do not know who was present at the time I had the conversation about the sale of my contract. [117] It was in his office. I do not recollect whether any other person was present or not. With reference to the conversation with Mr. Zaumeyer, no one was

(Testimony of E. Clemens Horst.)

present. The relative cleanliness of a hop is shown in the sample two years afterwards in the same way it would be a short time after its picking.

There were some bad hops in the Russian River district in 1912. Some of the Sonomas were very bad. The Sonoma crop was mixed. Some were very good and some were very poor.

If the cold storage was right and the hops were good when they were put in the cold storage the berry would be kept firm for two years.

Q. If a district happened to produce all bad hops in any one year, the best of that crop would be considered choice?

A. But we do not run across that condition.

Q. Some of the Sonomas were bad that year?

A. They were mouldy, that is lousy.

Q. Suppose the entire crop had been lousy, then, of course, there would have been the relative degrees of goodness of those hops?

A. The best average crop of the year would be the choice. That is a condition you do not run across.

Q. If you should happen to run across such a condition, where the entire crop was mouldy, a man would have to take the best of that mouldy crop as a choice?

A. If he confined himself to a particular locality, and the choice hops of that locality were all mouldy, he has got to take mouldy hops.

Referring to a telegram dated September 27th, 1912, you sent a letter dated September 28th, 1912, reading as follows:

(Testimony of E. Clemens Horst.)

San Francisco, Sept. 28th, 1912.

PABST BREWING CO.,

Milwaukee, Wis.

Gentlemen:—

We confirm telegraphic correspondence as follows: [118]

Sent to you Sept. 27:

Mr. George wires us you are now negotiating resale to other dealers of the two thousand bales cosumnes we sold you and that you wish all these Hops held on coast until you order hops forwarded period We are willing hold these hops on coast if you accept deliveries now on coast less freight allowance period. We are willing to resell the two thousand bales for your account or we are willing to exchange all or part for nineteen twelve oregons or yakimas at difference in price or we are willing make term contract for yakimas and cancelsale Cosumnes twelves period. You can appreciate that we must know your conclusions now so we can complete our nineteen twelve deliveries to other buyers please wire us fully direct to San Francisco period We do not think you can rush sale of two thousand Cosumnes as all big deals at present are for Oregons for export.

Received from you Sept. 28.

We will not accept deliveries now or make any trade before full line samples submitted to us may consider cancellation of contract with offer from you.
SENDING SAMPLES.

We sent you to-day by first class special delivery mail twenty samples of hops including a number of

(Testimony of E. Clemens Horst.)

samples of 1912 cosumne hops of the contracted quality. We are quite willing to deliver you hops from California districts other than cosumnes if you prefer to change though because of the mixed quality and considerable mould in the Sonoma and Russian River districts this year, we do not wish to handle hops from those districts.

We will thank you to wire us upon receipt of the above samples numbered 1 to 20 all the numbers that you prefer and please give us the number~~d~~ of your preference and we will fill your order as much as possible in the order of your preference.

In case you should resell all or any part of your 2000 bales we suggest you do not make your sale on samples as you might have a rejection from your buyer if you sell other than according to your purchase which was on quality.

You will find all above samples sent you far better than 1911 crop and we hope therefore that you will conclude to use your 2000 bales instead of reselling.

We regret that we will not be in position to cancel the trade on 1912's though if you make us any proposals for exchange for other hops either pacifics sacramento's or foreigners we will do our best to meet your wishes, though we would need to have the offer for some change from your good selves.

Awaiting your telegraphic advice of your preference of the 20 samples mailed you, we are,

Yours faithfully,

E. CLEMENS HORST CO.

The samples referred to in that letter were sent to

(Testimony of E. Clemens Horst.)

us because [119] we demanded the samples before shipment was made. That is embodied in our purchase order #54,808.

Q. You may state the fact, if any there be, whether or not the— A. Yes.

Q. Subsequent to that you asked them to send you samples and they sent you these four samples numbered from 21 to 24? A. Yes.

Q. Did you submit those samples to the farmers or growers that were on the stand? A. No, sir.

Q. Those growers had no opportunity in October to compare those samples with the ones that you showed them?

A. No, sir. A lot of growers signed statements and we got them before we ever got those four samples. A good many of these signed statements we got before we got these four samples.

Q. You commenced to prepare for this lawsuit before you knew the samples had been rejected?

A. I prepared for the lawsuit before we picked the crop. I have had considerable experience in litigation. I always prepare for lawsuits immediately on their appearing in sight. Whenever the market drops.

[Testimony of T. L. Conrad, for Plaintiff.]

Testimony of T. L. CONRAD.

Witness was sworn and testified as follows:

Direct Examination.

(By Mr. DEVLIN.)

I am by occupation a hop grower and have worked for the plaintiff for twelve years in the Cosumnes dis-

(Testimony of T. L. Conrad.)

trict. I have had charge of their ranch for the last ten years as general superintendent, seeing that the hops are properly picked, cured and put in bales and shipped. I dried hops for Horst Bros. before I went out there. Have been in the business for fifteen years and am now 34 years old. I am familiar with the different ranches in the Cosumnes River district and this consists of 1000 to 1100 acres. I had charge of the [120] picking of the 1911 and 1912 crop. We used all reasonable care to cure and pick them. We picked the hops by machinery and the clean hops were kept separate and we baled them separately so as not to get in with the other hops of a particular quality. In general hop growers mix all the hops together. We baled 4,300 bales that year of which 200 bales were clean-ups. It made them 4,100 bales better because we took out the clean-ups. The hops were air dried. We dried them at a lower temperature and they retained the flavor and quality of the hop better.

Q. What would you say as to the quality of the crop of 1912, the 4,300 bales, as to being choice hops or not?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness on a matter that he is not shown to be expert in.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #26.

They compared favorably with the 1911 crop.

(Testimony of T. L. Conrad.)

They were clean picked. As cleanly picked as the 1911 crop. Our hops were just as clean as anybody's; if anything they were cleaner. I examined the hops of Grimshaws, Kennedy, Murphy and Rooney. If anything ours were cleaner than theirs. I have examined samples one to twenty and samples 25 to 38.

Q. What would you say about their quality as being choice hops or not?

Mr. POWERS.—I object to that on the same ground as the last objection.

The COURT.—Objection overruled and exception noted.

Mr. POWERS.—Exception.

Exception #27. [121]

I found them to be choice hops. I did not find an undue proportion of leaves. I think they were very cleanly picked. Our hops were not damaged any by rain that season. They were picked before the rain commenced.

Cross-examination by Mr. POWERS.

Q. Was there any reason why your hops should have sold at a less figure than anybody else's that year?

Mr. DEVLIN.—That is objected to on the ground that it assumes a fact that is not true. The hops were sold at a less figure because the market dropped, as shown by the testimony of the witness, and that had nothing to do with the sale or price.

The COURT.—I will sustain the objection.

(Testimony of T. L. Conrad.)

Mr. POWERS.—Exception.

Exception #28.

Q. You say that these hops were better, if anything, than Mr. Jack's hops?

A. I do, yes, sir. I did not examine Mr. Jack's hops very closely, but I saw them when they were picking them and ours were better in color, they were as good in lupulin.

Q. Take an air-dried hop and a kiln-dried hop after they came away from the ranch, could you pick out an air-dried Cosumnes hop from a kiln-dried Cosumnes hop?

A. I am not a hop expert, no, sir. The Horst Cosumnes hops of 1911 and 1912 were practically of the same quality. They were baled and handled in the same way. One crop was practically as clean as the other. Very few of the Horst crop is picked by hand. A few of the hops were picked off of the vines after they came from the machine. They were all put in the machine and picked. The machine picks them cleaner than by hand. I have been handling the picking machine for 6 years. I consider sample 33 an absolutely clean picked hop. [122] With reference to sample 38 I cannot see much difference in them. They are practically the same. Sample 21 is a clean picked hop. I cannot see very much difference. One has a stem, but that is liable to get in any sample.

Q. Is sample 21 a better looking hop than the other? A. I cannot say, I am not an expert.

Q. Are the berries firm and whole in sample No.

(Testimony of T. L. Conrad.)

21? A. They are very good, yes.

Q. How would you say the berries are in the others? A. Practically the same.

[Testimony of Theodore Eder, for Plaintiff.]

Testimony of THEODORE EDER.

Direct Examination by Mr. DEVLIN.

I am general superintendent of plaintiff and have been since 1898. I have general charge of all their ranches in California, Oregon and British Columbia, and I am familiar with the hop ranch of plaintiff in the Cosumnes River. I have been around the ranches out there. I knew the crop of 1910, 1911 and 1912. I know what a choice hop is in the trade.

Q. What do you understand a choice hop to be?

A. The best of the section.

Q. If there a better quality then choice hops known to the trade? A. Yes, it is fancy hops.

Q. Choice is an elastic word?

A. There are hops of first pick and second pick, and they are choice hops, but are not exactly alike.

Q. What have you to say as to the quality of hops raised by E. Clemens Horst and Company in the Cosumnes District in 1912, as being choice or otherwise?

Mr. POWERS.—I object to that as irrelevant, incompetent and immaterial, and calling for the conclusion of the witness on a matter which he is not found to be expert in. [123]

The COURT.—Objection overruled.

(Testimony of Theodore Eder.)

Mr. POWERS.—Exception.

Exception #29.

A. I believe they were choice. I am satisfied that the 1912 crop was better than the 1911 crop. I know Mr. Zaumeyer. I met him on the train in 1912. I told him we would make a special effort to give him clean hops and we did. He accepted hops of the 1911 crop without any complaint.

Q. I will ask you whether the hops for 1912 grown on the Horst ranch were cleanly picked as that term is understood in the trade?

Mr. POWERS.—I object to that on the same ground as the last question unless he knows that they were submitted to us, it would be irrelevant, incompetent and immaterial.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #30.

I know of certain hops to be segregated in the 1912 crop which were clean-ups. There were about 200 bales. They were of different quality. The general system is to pack all of the hops together, not separating them. By separating some of the hops from clean-ups we get a better quality. I have examined sample 20 and samples 25 to 38 and can pass an opinion upon them. I believe them to be choice hops and to be cleanly picked. It is impossible for any person to tell what their flavor is or in regard to their lupulin. Stems can get in the samples and the samples are bound to break where the stems are. They do get in once in a while. I call samples 33 a clean hop. I consider sample 38 a choice hop. It

happens to be one of those accidents where you have a seam in the middle. I would say they do compare with sample 21 as to cleanliness. I do not see much difference.

It was thereupon stipulated on the part of the defendant that upon plaintiff's counsel stating that certain witnesses would testify [124] to certain facts concerning the experience and capacity of experts that the witnesses would be deemed to have testified in the same manner as the other growers, and that defendant should be deemed to have the same exceptions and objections, and that the witnesses would be deemed to have the same experience and qualifications as the experts and no more than the grower witnesses who have already testified and that the defendant would have the same objections and exceptions to their testimony as not being expert.

Thereupon Mr. Devlin offered the testimony of A. E. Murphy, who had examined five samples on October 23d, 1912; Mr. Bietzel, who had examined seven samples on October 23d, 1912; A. A. Merkley, who had examined 26 samples; A. A. Hawk, who had examined 25 samples; Mr. Charles Colquhoun, who had examined 26 samples on November 26th, 1912; John Chipps, who had examined 25 samples on November 25th, 1912; George Zongley, 25 years' experience, who had examined 25 samples on November 26th, 1912; W. J. Castleman, 20 years' experience, who had examined 25 samples on November 26th, 1912; William Johnson, 23 years' experience, who had examined 24 samples, November 23d, 1912;

H. Gerber, 30 years' experience, who had examined 24 samples; A. T. Murphy, 2 years' experience in the Cosumnes district, who had examined 25 samples on November 18th, 1912; William Fay, hop grower, ten years' experience in Cosumnes district and American River district, who had examined 25 samples on November 18th, 1912; E. L. Kunz, 29 years' experience, who had examined these samples; W. L. Zednetter, 6 years' experience; P. W. Rooney, five years' experience; E. T. Rooney, five years' experience on the Cosumnes, who examined samples; J. Calverhouse, five years' experience on Cosumnes, who examined samples; B. B. Hoofer, 30 years' experience on the Cosumnes; J. A. Crowell, 6 years' experience as hop grower on Cosumnes; J. A. Pond, 28 years' experience as hop-grower in Yolo County; J. Z. C. Lattin, 2 years' experience on American River and [125] 10 years on the Cosumnes; Anton Mento, 6 years on the Cosumnes and Del Paso; George Minkey, 36 years at Mills, California, and on the American River; Mathew Kennedy, 8 years' experience in the Cosumnes; Ezra Castle, 10 years' experience on the Cosumnes; Jacob Castleman, 20 years' experience on the Cosumnes and at Perkins and in Yolo.

[Testimony of F. G. Ernest Lange, for Plaintiff.]

F. G. ERNEST LANGE was sworn.

Direct Examination by Mr. DEVLIN.

I handle the general office work and special work for Mr. Horst and have been so connected for the last ten years. I have bought and sold hops. A

(Testimony of F. G. Ernest Lange.)

great many samples of hops come to our office. Thousands of samples in a year. They have to be graded, and I am handling hops all the time. Outside of that I have graded hops on the ranches. We have a large room in Mr. Horst's headquarters in San Francisco, where hops are kept. It is part of my duty to grade the hops as to determine their quality as to being choice or otherwise. I have been thus engaged off and on during the last ten years. All of our lots on the ranches are lotted with special numbers. Each ranch has a special series of lot numbers and tags are put on the bales in such a manner that they are put on there permanently. They are put on with hog rings. All of the hops are lotted up in lots of 100 bales or less. As soon as they are lotted up, tag samples are taken from each lot, usually one samples for every twenty bales and those samples are marked by the person who takes them off the lot number, and the lot from which they were taken. We have a couple of ranches at Cosumnes; several at Perkins, six miles from Sacramento; a ranch at Wheatland in Yuba County; a ranch in Oregon, at Independence, and a couple of ranches in British Columbia, and one in Ukiah. I have been on nearly all the California ranches. I have graded hops from all of them down in the office. [126] The lot numbers for the Cosumnes series run from 450 to 550, and the samples marked 450 to 455 I know comes from one of the ranches in Sacramento County. The other ranches have their numbers. In keeping our books the lot number of the hops sold

(Testimony of F. G. Ernest Lange.)

shows that they belong to the Cosumnes ranch and I can tell the lot number, whether the hops belong to the Cosumnes district or any other district. We can go all through the books and tell. They are retraced in that way. We have offices in the eastern part of the United States and an office in London. The main office is in San Francisco. Our sales agents send in letters or telegrams reporting the sales, and they are entered up on the books and entered in the sales record. I am familiar with the books of the E. Clemens Horst Company. At different times I have done work on the books.

Q. You are familiar with what we call the 2,000 bales sold to Pabst & Company? A. Yes.

Q. And the entries that appear upon the books relating to that sale and the amount received from those hops after November 4th, 1912? A. I am.

Q. Have you made an examination of the books with the purpose of ascertaining the price at which they were sold and the person to whom they were sold?

Mr. POWERS.—I object on the ground that it takes for granted that there is in evidence a specified 2,000 bales set aside to Pabst & Company and there is no such evidence. That is what I have been trying to get at.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #31.

A. I have. I have made examination of the vouchers and memorandums of sales sent on by the agents

(Testimony of F. G. Ernest Lange.)

selling these. All of our hops in the United States and Canada are insured under floating insurance, [127] and it covers all the hops, no matter where they are, in any warehouse, or in any of our warehouses on the ranches. There is a flat rate for everything.

Q. What books did you have to examine to do that?

Mr. POWERS.—I object to this as irrelevant, and immaterial. I also object with reference to taking a certain number of hops that he thought was the 2,000 bales sold, and a certain other number of hops that he thought they should be used as the basis of comparison, with these 2,000 bales in order to determine the amount, and that takes for granted that there is in evidence facts showing the 2,000 bales were set aside to the Pabst people, and facts showing that there were certain other hops with which they were to be compared. These facts are not in evidence.

The COURT.—The basis of my ruling a few moments ago was this: There is evidence here to show that there were 2,000 bales on hand appropriated to this contract,—that is, if the jury so find. If the jury finds that there is no such evidence, then, of course, this evidence as to the relative amount of the insurance would fall. I will overrule the objection.

Mr. POWERS.—I object to it on the ground that it is not the orderly procedure. That the proper procedure should be to prove that there was a certain

(Testimony of F. G. Ernest Lange.)

2,000 bales set aside and that there were certain other goods that were covered by the same insurance.

Mr. POWERS.—We note an exception.

Exception #31½.

A. I examined the books to find out to whom the hops were sold after November 4th, 1912, and I figured out the average number of days and taking the value of the hops, I figured the insurance rate at the floater rate, that is \$1.25 per 100 pounds per annume. I also figured the interest. I went through our books and found [128] the prices at which we had sold the 2,000 bales to other parties after November 4th, 1912.

Mr. POWERS.—I move that the answer be stricken out as not responsive to the question.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

Exception #32.

Mr. DEVLIN.—(Q.) Did you figure any interest on losses?

A. I figured the interest on approximately \$2300 difference in the price between the price we sold to Pabst and the price we sold to the other parties.

Mr. POWERS.—I move that portion of the answer be stricken out which the witness says was the difference in price for which they would have been sold if they had been sold at 20¢ on the ground that it is not responsive to the question.

The COURT.—Motion denied.

(Testimony of F. G. Ernest Lange.)

Mr. POWERS.—Exception.

Exception #33.

We figured the interest at 6%. The sale to Pabst Brewing Company was a coast price, and most of the sales made of the 1920 bales of the 2,000 bales sold other parties after November 4th, 1912, were sold on delivery prices. Delivered at the town where the brewery is situated. There are various freight rates covering those sales, and the tare is figured at 5 lbs. per bale, which is the usual trade custom, and the freight on the tare is figured on the amount of pounds of tare at the freight rate under which the invoices were made out to the various persons who bought the hops.

Mr. POWERS.—I move to strike out that portion of the answer referring to the fact that most of the sales were sold on delivery prices at the brewery, on the ground that it takes for granted a fact to be in evidence which is not in evidence, and is necessarily hearsay. [129]

The COURT.—Motion denied.

Mr. POWERS.—Exception.

Exception #34.

Q. Did you have to examine many books and vouchers to make up that?

The COURT.—Mr. Horst has testified where these sales were made.

A. I did. I also figured up the items of storage. A number of the hops were on the coast on November 4th, and a number of bales were in our warehouses, and we figured on the charges at the regular monthly

(Testimony of F. G. Ernest Lange.)

rate charged by the warehouses for the number of months which those hops were stored there. There are certain miscellaneous charges.

Q. What is the aggregate of the miscellaneous charges?

Mr. POWERS.—We object to this on the ground that it calls for hearsay evidence as to what the charges were, and whether the charges were in any way connected with these 2,000 bales. These are expenses made in the east and paid out by somebody else. The purpose for which they were paid out can only be determined by the man who paid them out. Certain entries were made by the witness and until they are shown to have been in some manner connected with these 2,000 bales by someone who carried on the transaction, it is irrelevant, immaterial and hearsay.

The COURT.—Let us know in the first place what these miscellaneous items are, then I will be able to understand the objection.

A. These were storage charges, local freight, cartage and way, sampling, repairing and any other charges like that that we could have the vouchers to cover.

The COURT.—In the regular course of your business? A. Yes.

Q. And appear in your books in the regular course of business? A. Yes.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #35. [130]

A. We know just what lot these items cover.

(Testimony of F. G. Ernest Lange.)

Mr. POWERS.—I move that that be stricken out as not responsive to any question, and being impossible for this witness to know of his own knowledge.

The COURT.—It may not be directly responsive to any question, but it is enlightening all the same.

Q. Have you stricken out of that list all expenses in connection with trips to Canada and things of that kind?

A. Mr. Devlin, that would not go under these miscellaneous charges. That would go in under overhead. There are discounts to brewers for cash payments.

Q. What is that for?

A. 1% discount to the Eagle Brewing Company and 1% discount to the Gulf Brewing Company. That is the usual custom to discount for cash payments. Those actually appeared in our books. In our ledger under bad debts and uncollectible account, appears the sum of \$262.19. There is a difference between the amount of the invoices and the amount we collected.

Mr. POWERS.—I object to any testimony as to losses as I understand it, there is no rule that permits a man to gamble with the goods. He sells them and takes his own risk when he makes a sale, and the account becomes his. It is in no way connected with the defendant in this case. Any sales that took place on which there were losses is irrelevant.

The COURT.—I do not think that can be the rule. If, by reason of a breach of the contract for the pur-

(Testimony of F. G. Ernest Lange.)

chase of goods, the man left with those goods on hand, the law requires him to take all reasonable means with reasonable expedition, adopting, of course, only the ordinary methods of business, to dispose of those goods at the best figure that he can procure for them. That he owes to the one with whom he had the contract of sale, to protect him from damages as far [131] as possible. In other words, you cannot, as I said yesterday, permit those goods to go to waste, and charge him with the whole loss. Now, if taking the usual and ordinary methods, and using all of the usual and ordinary precautions of business, he suffers a loss in the same way that a man does that carries on his business in the usual and ordinary way, he is entitled to that loss accruing on the goods which were left on his hands by reason of the breach of the contract; and in the nature of things he is entitled to recoup any loss, using all due and reasonable diligence to make the most out of the goods that he can under the circumstances.

Mr. POWERS.—I will add to my objection the further ground that it had not been shown that this loss occurred upon the 2,000 bales or any portion of the 2,000 bales, that were set aside to the Pabst people.

The COURT.—The witness has stated in response to questions that they were with reference to these sales.

The WITNESS.—All of these charges were on the 2,000 bales.

(Testimony of F. G. Ernest Lange.)

Mr. POWERS.—My point is that there is nothing in the evidence concerning the 2,000 bales. I will take my ruling on it and my exception.

Mr. DEVLIN.—(Q.) Now, are there any other items besides the overhead? If not, explain the overhead in detail.

A. There is a list of bad accounts, uncollectible accounts.

Mr. POWERS.—I move that any testimony with reference to a loss of bad accounts be stricken out.

The COURT.—Motion denied.

Mr. POWERS.—Exception.

Exception #36.

A. This is a different item. Those items were collected. We invoiced them at a certain price and got a less price. We had [132] to collect them through collection agencies and we got a less price. In these cases we have not been able to collect at all for them. We lost the money.

The COURT.—Were those sales made in the usual and ordinary course of business transactions of that kind? A. yes.

Q. And the losses accrued through circumstances that you were not able to avoid?

A. They were beyond our control

Q. Bad accounts you call them?

A. Yes. At the time we sold them, the breweries were considered all right, and there was nothing to show that we would not get our money from them. They were sold in the regular course of business, the same as any other.

(Testimony of F. G. Ernest Lange.)

Mr. POWERS.—I object to any testimony as to bad accounts on the ground, first, that there is no particular 2,000 bales set aside to the Pabst people, and when there were 3,000 bales on hand there was nothing to show, at the time the original sale was made, that these were sales made for the Pabst Company account, or the goods of Pabst & Company. Second, when the Horst people sold those goods, they then took those accounts in place of the claimed account against the Pabst people, and it is immaterial and irrelevant, and based upon hearsay testimony, as to whether these people are able to pay or not.

The COURT.—I will overrule the objection.

Mr. POWERS.—Exception.

Exception #37.

I have besides the overhead charge, a charge here for interest on the unpaid accounts at 6%. On my statement I show a list on the 2,000 bales between the price sold to Pabst & Company and the amount collected from the brewers to whom we sold the 2,000 bales after November 4th, 1912. That was the price sold to Pabst & Company and the price at which we sold the hops. [133]

Q. In taking into consideration the overhead expense you have charged for the selling cost?

A. Yes.

Q. Without taking any of the expense of the San Francisco office? A. No, sir.

Q. Please state what you put in the selling cost and how you arrived at it to be distributed to these 2,000 bales.

(Testimony of F. G. Ernest Lange.)

A. All of our agents, or salesmen, turned in expense slips, covering all the charges of the office for the different periods, and those expense slips come in either every day or once a week in the ordinary course of business all the time. Those show all the eastern expenses. I have tabulated the expenses leaving out such items as estimates for office force and things like that, and the expense slips were turned in yesterday.

Q. Between what dates from November 4th?

A. November 5th, 1912, to June 30th, 1913. That is the selling season for the 2000 bales.

Mr. POWERS.—We object to this on the ground, first, that the charges have not been testified to by any person who was familiar with the reasons for the charges being made; that they were made with reference to the New York office and the Chicago office, and they carried on a multitude of businesss; that any knowledge that this witness or anyone else has is necessarily hearsay; that whether any one of these expenditures is in any manner connected with Pabst Brewing Company is necessarily hearsay; that the witness does not pretend to have had any knowledge for the reason for the expenditure, nor the manner in which those expenditures were connected with the Pabst goods. But the principal reason that it is not admissible is that *is* is necessarily hearsay.

The COURT.—How are you able to know that these expenses relate [134] to these hops that you are testifying about? A. On the 2,000 bales?

Q. Yes.

(Testimony of F. G. Ernest Lange.)

A. They refer to all the hops sold by the offices during that period.

Q. And the overhead expense relates to any other business transaction during that period, and you are apportioning them up?

A. The amount sold by the other offices the total amount of bales of hops sold during that period.

Q. And the percentage that would apply to the 2,000 bales you arrive at simply by figuring?

A. The percentage that would apply to the 1,346 bales.

Mr. DEVLIN.—We do not confine that to the 2,000 bales. We charge that against 1,300 bales, and some odd, out of the 2,000 because the 7,000 bales we will admit,—we will have that explained. We do not charge for the full 2,000.

Mr. POWERS.—We object to it on this same ground.

The COURT.—You are repeating your objection. I have already ruled on it. Wait a minute and give the Court a chance, and I will try and rule on it again. The only means, then, by which you arrive at these figures is by taking a certain percentage of the overhead charge in proportion to the number of pounds of hops sold, the 1346 bales, and you take the proportion of the 1346 bales to the entire amount of business transactions, or the volume of business, during the period that you were engaged in selling those 1346 bales?

A. The entire transactions, the volume of business

(Testimony of F. G. Ernest Lange.)

done through those offices. These costs refer to those offices only.

The COURT.—I do not think that is admissible.

Mr. DEVLIN.—Let me make it a little plainer. Some of the hops of the 2000 bales were sold in San Francisco, 200 bales or so. [135]

A. Yes. There is no charge made for that at all.

Q. There were certain number of those bales, about 500 and odd, that were sold on prior contracts?

A. There were 497 bales sold on prior contracts and we have not made any overhead expenses on them.

Q. Beginning on November 4th, 1912, until you finished selling the remainder of the bales, about 1300 and some odd bales, were there certain expenses incurred in New York and Chicago and eastern states in selling the remainder of the 2,000 bales of what we call the Pabst hops and other hops?

Mr. POWERS.—I object to that as hearsay.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #39.

A. Yes, sir. That appears on the books of the company. We have not charged our own commission for selling the hops.

Q. Now, do you know if, for instance, I should deliver 2000 bales of hops to Horst & Company to sell, such as these hops, what would be the usual and customary price per pound for selling such hops?

A. About a cent and a half a pound.

Q. And in lieu of a cent and a half a pound, you

(Testimony of F. G. Ernest Lange.)

are simply giving here a proportion of the overhead charge in the New York office for selling these 1300 bales of hops, is that correct?

Mr. POWERS.—I will object to this line of examination until my question has been ruled upon by the Court.

The COURT.—I think this is proper. He is trying to ascertain the facts.

Mr. POWERS.—Exception.

Exception #40.

A. Yes.

Q. Have you eliminated from the overhead charge the hops sold in San Francisco, the 200 bales? And the expense of the San Francisco [136] office and all of the expenses connected with the delivery of the 497 bales? A. Yes.

Q. Have you examined the vouchers turned in to the firm for the expenses of selling these hops, etc. and those expenses appear on your books?

A. Simply as an expense account. I am familiar with the delivery of these hops to eastern agents after November 4th, until the last of those we call the Pabst hops were sold. The statement showing hops on hand I got from the books. I made an examination for the purpose of ascertaining the amount of hops of the 1912 growth at the Cosumnes ranch on hand in November, 1912, and the amount sold. The number of bales of hops in 1912 that were on hand on the Cosumnes ranch in November 4th, 1912, was 3,062 bales. Some of them were at the Cosumnes ranch in our warehouses; some of them en route

(Testimony of F. G. Ernest Lange.)

to the east; some of them were at Milwaukee and some of them at Chicago and some of them at New York. I have charge of the stock room and the books, and I know the stock that goes out and where it goes to, and I know where the 2000 bales of hops were sold, and that afterwards returns were made by our agents stating where they were sold and the prices that they obtained, and I know the salaries that were paid to our salesman during that time, from the books, and I know the expenses that were incurred.

Q. And they related to the 2000 bales of hops, and also to the other hops?

Mr. POWERS.—I object to that as being hearsay.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #41.

The COURT.—You know that in the ordinary course of business? A. Yes.

Mr. POWERS.—Exception.

Exception #42. [137]

Q. And did the corporation of E. Clemens Horst Company pay these expenses and these salaries, based upon those statements?

A. Yes. They were paid before this suit was commenced in the ordinary and usual course of business.

Mr. DEVLIN.—I will take your Honor's ruling now, if you think it is not proper.

The COURT.—With this explanation I think it is quite proper.

(Testimony of F. G. Ernest Lange.)

Mr. POWERS.—Exception.

Exception #43.

Q. Did you make a calculation, without giving it now, as to the proportion of the expense these 1300 bales bore to the total expense, that you have just described?

Mr. POWERS.—I object to it as irrelevant, and immaterial, calling for the conclusion of the witness on a question of law, which he is not competent to decide, and it is necessarily based on hearsay as to services performed by various people in connection with the Pabst goods, and in connection with other goods, and as being an attempt to put into the record evidence which should be obtained from the men who made the expenses, and thus know why the services were performed and what the expense was. For instance, there was a Christmas present included amongst these. There are stenographers' salaries included amongst them. There is a trip to Chicago.

WITNESS.—The items of expenditures with reference to the business of this corporation so transacted in New York or in any other place in the east are sent on here and entered in our books here in San Francisco in the regular and orderly course of business. The reports come daily and weekly. A slip is made out by each salesman every day, but they do not always send them then.

The COURT.—Under those circumstances I think it is perfectly competent. The nature of the business transactions of this corporation involve certain overhead charges as they are called. There is a

(Testimony of F. G. Ernest Lange.)

charge for regular salaries and for the expense of transacting [138] the business. Now, that business was, and the witness is competent to testify, of a certain volume, and making up a part of that volume was the disposition of this 1346 bales of hops which it is claimed here was disposed of on behalf of a broken contract with the Pabst Company. Now, they propose, and I think they are correct, to ask for, if they are entitled to damages, if the jury finds they are entitled to damages, the proportionate amount of the overhead charge which would apply to transactions involved in disposing of the 1346 bales of hops being returned to them. I think they are entitled to it, if the jury finds that they are entitled to recover at all. I will overrule the objection.

Mr. POWERS.—Exception.

Exception #44.

The sales book is in daily use. It took me five or six days to make this examination.

Q. Have you made correct estimates on the basis that you have given to the Court for your calculations?

Mr. POWERS.—I object to that on the ground that it calls for the conclusion of the witness on a question of law. There were sales of certain portions of these 2000 bales during the months of November, December, January and February, and the amount of goods left was, of course, diminishing. Now, the witness is asked whether or not he made a correct statement of it.

Q. Did you figure out mathematically correctly the

(Testimony of F. G. Ernest Lange.)

amounts upon the basis you have given in your testimony?

Mr. POWERS.—I object to that on the ground already stated, and on the further ground that it is necessarily based on hearsay evidence.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #45. [139]

A. Yes. I was personally familiar with the hops and samples of hops taken from the 1912 Cosumnes crop. I did not see all of them, but I saw some of them. I did see the samples numbered 1 to 20 and 25 to 38 that went to the Pabst Company.

Q. In the trade what is meant by choice hop?

Mr. POWERS.—I object to that as irrelevant and immaterial, calling for the conclusion of the witness upon a matter which he is not shown to be expert in. He has not bought or sold hops.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #46.

A. The first average of a particular section.

Q. What do you say as to those samples being choice hops or otherwise.

Mr. POWERS.—Same objection.

The COURT.—Same ruling.

Mr. POWERS.—Exception.

Exception #47.

A. I would say they were choice Cosumnes hops. I do not believe all of the samples are Cosumnes hops, but the most of them are Cosumnes hops, and

(Testimony of F. G. Ernest Lange.)

they are all choice hops. All the hops grown on the Horst ranch were air dried.

Q. Please state what your examination discloses to have been the price obtained from the resale of the 2,000 bales of hops that it is claimed was sold to Pabst Company and refused to buy it.

Mr. POWERS.—We object on the ground that it is irrelevant and immaterial, based on hearsay evidence, based on a conclusion of law as to what is a proper method of apportioning; based upon an improper theory that the 2,000 bales shall pay a proportion of the entire overhead expenses from November 4th, 1912, until the last bale was sold.

Mr. DEVLIN.—I will change that question.
[140]

Q. Have you made an examination of the books of the plaintiff for the purpose of ascertaining what the books show was the loss that had been sustained by the plaintiff measured on the assumption that the hops were sold to Pabst & Company at 20¢ per pound, and what plaintiff actually received for the hops, together with the cost of reselling them. Have you made such an examination?

A. Yes. And I have made the calculation just described for the purpose of ascertaining that fact.

Q. Will you please state the result?

Mr. POWERS.—I repeat the objection, that it is based on hearsay evidence as to what was the cause, and the reason for the several expenditures reported from the Eastern states.

The COURT.—Objection overruled.

(Testimony of F. G. Ernest Lange.)

Mr. POWERS.—Exception.

Exception #48.

A. The 2000 bales were resold at an average price of .1366¢

The COURT.—We do not want the average rate at all. We want the actual amount you received on the sale of these hops. Based on the figures that you have heretofore given.

A. \$23,584.80. \$32,651.73 plus several items that I have tabulated in accordance with my previous testimony. I figured the overhead to be \$4459.30.

Statements referred to by witnesses were three sets of tabulations reading as follows:]141[

CHICAGO OFFICE EXPENSES.

DATE. AMOUNT.

Nov. 5, 1912, to June 30, 1913.

Nov. 5.	\$ 8.96	26	10.00
5	.50	27	.60
6	3.80	27	7.40
6	9.70	28	8.39
7-8	7.15	29	350.50
7	1.50	29	4.35
8	2.20	30	10.64
9	48.95	30	10.50
9	1.35	Dec. 2	1.65
9	35.20	2	.50
11	.50	3	4.87
11-12-13	18.95	3	9.35
12	1.45	4	5.05
13	.20	4	5.25
13	2.10	5	4.52
14	.50	5	121.12
14	2.35	6	.50
15	1.35	6	3.10
15-16	20.60	7	10.40
16	.50	7	8.60
18	9.65	9	10.36
19	.70	9	8.55
20	.50	10	2.70
21	.50	10	11.50
17-21	6.40	11	1.27
22	.50	12	3.00
22	.95	13	2.30
23	5.25	13	1.38
23	10.30	14-16	10.85
25	.50	14	2.50
26	12.90	[142]	

Date	Amount	Date.	Amount.
Dec. 16	\$ 1.75	7	1.50
17	.50	7	.58
17	10.05	8-11	2.00
18	12.50	8	3.25
18	1.85	9	1.55
19	16.55	10	29.20
19	2.82	13	12.15
20	2.25	14	.50
20-21	14.75	14	1.10
21	4.00	14	.50
23	8.29	15-30	10.00
23	3.00	15	11.00
24	.30	16	.60
24	13.50	18	13.75
25-26	6.62	20	1.15
26	3.00	21-22	1.41
27	1.60	23	.40
27	.50	24	1.85
28	.50	25	12.80
28	10.30	27	3.88
30	352.00	28	5.40
30-31	.60	29	8.93
31	1.50	30	6.70
Jan. 1	11.50	31	2.50
2-3	5.54	31	.70
2	17.00	Feb. 1	.50
4	39.05	1	12.80
4	10.30	3	.80
6	2.50	21	3.50
6	2.18		

E. Clemens Horst Company.

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Date.	Amount.	Date.	Amount.
Feb. 4	\$ 7.00	25	.50
5	.88	26	10.50
5	1.50	26	2.00
5	13.69	27	5.15
6	.50	27	.50
6	3.74	28	8.10
7	.50	28	350.50
7	5.76	Mar. 1	5.90
8	46.10	1	13.75
8	19.55	2	8.75
10	15.97	3	.50
11	1.48	4	7.76
12	.40	4	1.50
13	7.09	5	4.35
14	7.08	5	5.50
15	9.00	6	14.43
10-15	16.50	6	2.00
17	.50	7	.85
17	2.00	7	.50
18	4.94	8	13.00
18	.50	8	1.50
19	.50	10	39.91
19	.50	10	47.25
20	4.53	11	1.00
20	1.70	12	1.50
21	13.04	13	3.15
21	10.95	14	3.44
22-24	1.03	15	12.94
24	.50	3	1.31
25	2.78	[143]	

Date.	Amount.	Date.	Amount.
Mar. 17	\$ 1.03	10	6.31
18	2.68	10	.50
19	7.91	11	6.15
11-19	5.00	11	.50
20	6.77	12	13.02
21	7.60	14	.70
22	13.85	14	.74
24	.92	15	.50
25	3.95	15	2.23
27	8.25	16	.50
28	.50	16	40.10
29	13.14	17	.50
31	.50	17	.50
31	350.50	18	2.23
Apr. 1	7.33	18	.50
1	.50	19	13.75
2	7.58	21	15.45
2	.50	21	2.83
3	2.55	22	.71
3	2.00	22	.55
4	23.00	23	.50
4	10.50	23	.50
5	.40	24	.45
5	.40	24	.50
7	1.25	25	.50
7	.50	25	.60
8	2.93	26	12.90
8	10.45	28	4.51
9	.50	28	.40
9	.50	28	5.96

Date.	Amount.	Date.	Amount.
Apr. 29	\$.60	21	10.58
29	8.41	21	2.25
30	6.56	22	17.65
30	350.50	22	10.50
May 1	6.60	23	1.00
1	2.58	23	2.00
2	13.00	24	12.90
2	.50	24	.35
5	.60	26	5.55
6	1.10	26	.70
7	.50	27	.50
8	46.55	27	.50
9	.50	28	.50
10	14.10	28	.85
12	5.45	29	1.00
12	5.60	29	.45
13	1.25	31	390.55
13	9.40	31	12.80
14	17.51	June 2	3.45
14	2.00	3	5.90
15	.50	4	14.60
15	.50	5	8.80
16	.80	6	4.80
16	.50	7	8.35
17	12.80	9	13.00
17	.35	10	.45
19	10.70	11	.65
19	.60	12	.66
20	.63	13	.40
20	9.25	14	12.70

Date.	Amount.	Date.	Amount.
June 16	\$.40	27	1.15
17	.35	29	8.00
18	.50	28	12.80
19-20	.90	30	1.10
21	16.20	Ex Ledger I. G.	
23	9.90	M. Salary	975.00
25	.40		<hr/>
25	.50	Total	\$5399.80
26	.55	[145]	

NEW YORK OFFICE EXPENSE.

Nov. 4, 1912, to June 30, 1913.

Date.	Amount.	Date.	Amount.
1912.			
Nov. 9	\$ 21.43	Mar. 8	54.05
14	63.46	8	27.20
16	79.60	11	258.32
27	40.75	14	81.80
27	50.85	15	33.40
30	181.80	16	112.26
Dec. 6	102.70	Ex Ledger	
7	359.82	Nave's salary	
11	55.30	Nov./March	2200.00
16	84.95	Mar. 22	44.50
19	30.85	29	11.53
21	85.10	29	45.75
26	199.48	Apr. 2	147.95
1913.		5	1.80
Jan. 4	100.60	5	40.65
8	9.70	12	263.98
8	274.78	13	11.15
11	54.70	17	10.99
17	56.00	19	44.40
21	109.42	19	1.20
21	46.75	26	44.24
30	111.90	26	2.40
Feb. 1	174.05	30	5.25
6	50.50	30	125.00
6	46.90	May 3	38.94
14	183.26	3	1.95
18	72.70	10	209.50
26	37.10	10	2.10
28	64.05	14	7.15

Date.	Amount.	Date.	Amount.
17	49.45	11	7.35
17	16.25	14	37.45
19	10.90	14	1.90
21	7.15	21	1.60
22	11.20	21	16.08
	<hr/>	28	21.75
May 24	\$ 41.10	28	1.90
31	39.42	30	125.00
31	1.90	30	4.01
June 4	125.00	30	147.55
7	37.55		<hr/>
7	1.60		\$7,462.37
10	180.30	[146]	

EASTERN MISCELLANEOUS CHARGES.

Date.	Amount.	Date.	Amount.
1912.		7	5.49
Oct. 12	\$.92	11	6.00
12	1.07	11	.80
19	1.26	16	3.75
Nov. 20	2.50	17	6.00
20	4.00	17	5.70
21	3.65	20	10.00
22	1.00	20	10.00
22	.52	31	18.75
22	1.92	31	18.00
30	1.35	31	4.00
30	30.72	31	.45
30	2.05	31	28.16
30	9.60	31	.30
30	3.25	Jan. 4, 1913	72.32
30	.60	7	37.20
Dec. 2	26.06	21	8.16
2	2.25	21	3.00
3	1.35	31	42.70
10	10.00	31	5.25
7	9.00	31	2.80
7	3.66		

Date.	Amount.	Date.	Amount.
1913.		11	.64
Jan. 31	\$ 8.00	12	8.00
31	.90	30	6.00
31	2.00	31	2.16
Feb. 1	.08	31	3.00
1	1.75	31	.67
7	16.00	31	6.00
7	8.00	Apr. 1	8.74
21	4.50	16	1.04
28	11.44	21	15.08
28	.16	30	11.40
28	.81	30	.50
28	.81	May 1	3.00
28	2.50	10	2.28
28	.50	31	.08
28	1.60	June 30	.75
Mar. 3	1.41	30	.02
3	9.00		
11	1.25		
[147]			<hr/> \$549.63

(Testimony of F. G. Ernest Lange.)

To each of these tabulations was attached vouchers in the shape of bills containing items as a basis for each of the entries on the tabulated list:

As a sample of the vouchers attached, which were attached to the New York Office Expenses, are the following:

Bill of John J. Finn, Truckman, dated New York, Dec. 2, 1912:

Nov. 6.	2 Bales Hops 33 St. to N. R. Whre.....	\$3.00
13.	10 Bales 51 N. R. to Mallors 5/5.....	1.20
18.	1 do. do. do. Penn. R. R.50
19.	25 do. do. do. do.	3.00
20.	103 do. do. do. do. N. Y. C.....	12.36
21.	20 do. do. do. do. Eastern Bw...	6.00
		<hr/> 26.06

Bill of Erie Rd. Co., Dec. 10/12:

12/7. To shipping 98 bales Hops Ex. Str. Dayton from 51 N. R. to Wehawken Same being repeated at P51.

Car 205780 Boyhton Col 2 10.11..... 9.00

Bill of Lehigh Valley Rd. Co., Dec. 11/12:

From Stony Island

Lrge. 25 Bls. Hops to Nat. Docks..... 6.00

Merchants' Storage & Transfer Co., Milwaukee, Wis.

Dec. 16/12.

12/16/12. To cartage on 25 bales hops to the
St. P. Ry..... 2.50
To weighing the 25 bales hops @ 5¢
per bale.... 1.25

3.75

S. Fritz Nave, New York, 11/9/12:

Nov. 9.	Fredericks Salary.....	15.00
	Mrs. Harney's Salary.....	15.00
	Fredericks expenses.....	2.35
	Phlyer Slip #27.....	4.20
		<hr/>
		36.55

Proportion for the 5 days, Nov. 5 to Nov 9/12..21.43

C. A. Phlyer

Springfield, Worcester, Providence, Nov. 12.

	Hotel and meals.....	4.00
	Car fare local phones etc.....	.65
	Phone to Hartford from Providence.....	.50
"	Springfield Hartford,.....	.25
"	" Worcester.....	.25
	Fare Springfield to Worcester.....	1.25
"	Worcester Providence.....	.90
		<hr/>
[148]		7.80

S. Fritz Nave, Nov. 27/12.

Nov. 25.	Exchange & Dft.90
	do90
27.	Stamps.....	10.00
	Ticket N. Y. to New Haven.....	1.55
	Seat " "	1.00
	Ticket New Haven to Boston.....	3.25
	" Seat.....	1.00
	Boston to New York.....	4.75
	Seat.....	1.00
	Meals.....	6.60

<i>E. Clemens Horst Company.</i>	175
Entertaining (Machine).....	8.00
Hotel bills.....	4.50
Taxi, tips, bag boy, porters, carfare	
Phone calls, telegrams.....	7.40
	<hr/>
	50.85

December Bills. Jan. 8/13.

Dempsey & Carroll.....	1.00
Elbe File & Binding Co.....	.45
Foster-Scott Ice Co.....	2.50
Fifth Avenue Building Steno Office.....	30.63
New York Telephone Co.....	51.72
Patterson Press.....	24.60
Tower Bros. Stationery Co.....	22.35
United S. Realty & Imp. Co.....	50.00
Underwood & Underwood.....	36.00
Western Union Tel. Co.....	58.83
Postal Tel. Cable Co.....	8.81
	<hr/>
	276.88
Off for S. F. Nave personal Tel.....	3.82
	<hr/>
	383.67
Less B. C. Hopp Co.....	8.29
	<hr/>
	274.78

S. Fritz Nave, N. Y., Feb. 6th, 1913.

Feb. 6. Stamps.....	10.00
“ 6. Salary to Feb. 8.....	15.00
“ 6. Miss Weisell to 8th.....	15.00

“	6.	Fredericks expenses.....	1.60
“	6.	Sheridan sampling.....	5.30

 46.90

Mch. Bills, Apr. 12, 13.

Am. Dist. Tel. Co.....	1.00
Foster & Scott Ice Co.....	2.60
John J. Finn.....	20.05
5th Ave. Steno Office.....	18.38
Thomas S. Masterson.....	19.38
N. Y. Telephone Co.....	49.75
Patterson Press.....	15.00
Postal Tel. Co.....	1.15
Tower Bros. Stationery Co.....	16.25
Tower Mfg. & Novelty Co. fountain pen.....	2.50
U. S. Realty & Impt. Co.....	80.00
D. P. Winne Co.....	3.68
W. U. Tel. Co.....	33.69
Economy Clean Towel Co.....	1.00

 \$264.41

Charged as \$263.98. [149]

May 10/13. Charged as \$209.50

Itemized as follows:

1—April Bills:

N. Y. Telephone Co.....	23.10
Dempsey & Carroll.....	1.00
Foster Scott Ice Co.....	3.25
J. J. Finn.....	14.55
U. S. Realty & Imp. Co.....	100.00
Empire Furn. Co.....	11.40

Fidelity Whs. Co.....	25.24
5th Avenue Building Steno.....	15.65
Patterson Press.....	14.25
Tower Bros. Stationery Co.....	3.46
W. U. Tel. Co.....	14.15
Postal Tel. Co.....	2.27

228.32

May 10.

May Bills:

H. W. Dubois Carbon paper.....	1.50
Foster-Scott Ice Co.....	3.25
John J. Finn trucking.....	5.41
5th Ave. Bldg. Steno.....	8.45
Fidelity Whs. Co.....	22.64
N. Y. Tel. Co.....	33.50
Patterson Press Printing.....	17.95
Tower Bros. Sta. Co.....	2.75
U. S. Realty & Imp. Co. rent.....	100.00
Postal Tel. Co.....	1.34
W. U. Tel. Co.....	11.50
do	1.15

209.50

As a sample of the vouchers attached to the Chicago Office Expenses are the following:

Irving G. Markwart,

Chicago, April 15, 1903.

Telegram sent.....\$.50

Fare from Joliet to Chicago.....	.74
Car fare to Chicago.....	.25

2.23

I. G. Markwart, April 19, 1913.

Car fare.....	.50
---------------	-----

A. G. George, April 17, 1913.

Car fare.....	.50
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[150]

I. G. Markwart, Chicago, Ill., May 6th, 1913.

Car fare.....	\$.40
Telephone.....	.15
Spent cigars.....	.25

\$.80

I. G. Markwart, Chicago, May 13, 1913.

Car fare.....	.30
Stenographer's salary.....	12.50

12.80

I. G. Markwart, June 30, 1913.

Spent for Mr. Horst.....	.70
Car fare.....	.40

1.10

I. G. Markwart, Credits.

Nov. 30.	Salary.....	100.00
Dec. 31.	125.00
Feb. 21.	125.00
Mar. 31.	250.00
Apr. 30.	Salary.....	125.00

(Testimony of F. G. Ernest Lange.)

Mar. 31.	125.00
June 30.	125.00

\$975.00

Among the Eastern Miscellaneous expenses are the following:

Merchants' Storage & Transfer & Storage Co.,
Milwaukee, Wis., Oct. 12th, 1912.

100 bales of hops at 8¢ per bale, lot 461.....	\$ 8.00
To weighing charges on same at 5¢ per bale..	5.00
	<hr/>
	13.00

Same Company, Oct 12th, 1912.

Lot 462. 100 bales at 8¢ per bale.....	8.00
Thomas S. Masterson, March 31st, 1913.	
Feb. 25th. 50 bales 524 Red Star Line.....	3.00
New York, March 1st, 1913.	
50 bales 524 Hoboken.....	3.00
	<hr/>
	\$6.00

[151]

A. I figured the overhead to be \$4,459.30. Leaving out the overhead altogether and figuring commission at 6%, it would be \$6,000 and the difference would be \$1540.70. If we had charged a commission of 1½¢ instead of an overhead charge the total loss on 400,000 pounds would be \$34,192.43. If I had figured the commisison at 1½¢ a pound and taken 190 pounds to the bale, the commission would amount to \$5,700, or \$1240.70 more than the overhead charge, and the total loss estimated at 1½¢ on

(Testimony of F. G. Ernest Lange.)

an average bale of 190 pounds would be \$33,892.43. There is no such thing as selling hops at auction in the open market. A 2000-bale order if a large sale. Hops are generally covered by contracts prior to November of each year.

Cross-examination by Mr. POWERS.

The 3062 bales of Cosumnes hops were on hand in November, 1912; some were on the Cosumnes ranch, some were in Chicago, some at New York, some were en route east and some at Milwaukee. In Milwaukee they were at the Merchants Storage & Transfer Company's warehouse. In New York they were at the North River warehouse and the Terminal warehouse. Generally hops of that sort were sent to the order of E. Clemens Horst Company, or notify E. Clement Horst Company. Those in Chicago were at Sibley's warehouse. I will not be able to give you the amounts until this afternoon.

Q. What designation, if any, was made on any of these hops after November 4th, to indicate that they were Pabst goods?

Mr. DEVLIN.—I object to that as entirely immaterial and irrelevant.

The COURT.—Objections sustained. They were not called upon to designate them as Pabst hops after November 4th.

Mr. POWERS.—Exception.

Exception #49.

Q. Was there any act done by the Horst Company so as to segregate 2000 of the 3000 bales after November 4th, so that any person other [152] than

(Testimony of F. G. Ernest Lange.)

the Horst people themselves could determine which of the 3000 bales were to be considered as Pabst goods, and sold on the Pabst account?

Mr. DEVLIN.—That is objected to as immaterial and irrelevant.

The COURT.—Well, it is immaterial and irrelevant both if there is no question about the renunciation of this contract by Pabst on November 4th, but of course, I cannot now anticipate evidence which may be introduced to refute that fact. It is wholly irrelevant and immaterial so far as the Pabst people were concerned as to whether these hops were marked, and whether they were set aside, after the repudiation of that contract, because a contract repudiated before delivery is made is just as effective as far as the plaintiff is concerned as one that was repudiated after the time for delivery has arrived. If it is an absolute repudiation of the contract, they need not go through the idle ceremony, of setting aside the goods to be delivered to a person that has refused to receive them.

Mr. DEVLIN.—I will ask Counsel at this time if he claims or if he does not admit that Pabst and Company cancelled the contract, so far as they could cancel it, and repudiated it November 4th, 1912.

Mr. POWERS.—No question about that.

The COURT.—That being the admission, then the objection is sustained.

Mr. POWERS.—Exception.

Exception #50.

Q. How yere you able to determine in your com-

(Testimony of F. G. Ernest Lange.)

putation what portion of the expenses were incurred upon goods which were being sold on the Pabst account?

A. Why I knew the number of bales of hops that were sold by the eastern officers of the two thousand bales.

Q. Which 2000 bales?

A. The 2000 bales that he has of Cosumnes hops that Pabst had refused [153] to take.

Q. What 2000 bales were they?

A. I believe Mr. Horst already gave that to you. We have a list of the sales showing the 2000 bales.

The COURT.—(To Witness.) You do not catch Counsel's meaning. He is still reverting back to his claim that it was necessary to set aside the 2000 bales appropriated for the purpose of filling that contract. Instead of just simply taking 2000 bales out of the entire amount, you had to sell them as the hops that had been contracted for by Pabst, and his claim is that you should have set apart a certain 2000 bales of hops to fill that contract with. That is what his questions are directed to.

Mr. POWERS.—When you made up the price for which certain goods sold, how did you determine what portion of the 2000 bales should be used to fill that order?

A. Well, these are all the sales of Cosumnes hops since November 4th, 1912, that are included in this list. There were 1346 sold by the eastern office, and 494 bales by filling contracts already in existence.

(Testimony of F. G. Ernest Lange.)

The remainnig 1062 bales were also delivered on previous sales.

Q. Were the 1062 bales sold at higher prices than those which they had segregated to us?

A. No about the same price.

Q. Give us the prices that were obtained for the 1062 bales. Kindly compute it and let us have it after the recess.

Q. What other goods were being sold by the New York office at that time besides these 3062 bales of Cosumnes hops?

A. A total of 2536 bales. There were all kinds of hops, Cosumnes hops and different kinds of hops of the United States crops.

Q. What potion of them was sold during the month of November, 1912?

A. I have not a tabulation of that. [154]

Q. Can you give it to us?

A. I can give it to you.

Q. How many Cosumnes goods remained unsold in June 1913? A. 16 Bales.

Q. How many on May first?

A. Thirty-four bales.

Q. How many goods other than Cosunnes goods remained unsold June 1st.

A. I cannot tell you.

Q. How were you able to get the percentage of expenses properly incurred during the month of June, if you do not know the number of bales on which you computed it?

A. We had the total number sold during the period

(Testimony of F. G. Ernest Lange.)

from November 4th to June 30th of Cosumnes hops and other hops.

Q. Was it necessary to maintain an office in New York with a manager's salary at the sum of \$500.00 a month in order to sell 16 bales of Cosumnes hops?

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial and argumentative.

The COURT.—I think so. He has not made any statement which makes the assumption a proper one.

Mr. POWERS.—Exception.

Exception #51.

Q. What were the expenses of the New York office for salaries while those 16 bales were on hand to be sold? A. Which sixteen bales.

Q. Those on hand June 1st.

Mr. DEVLIN.—I think that is absolutely immaterial.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #52.

[155]

Q. What were the expenses of running the New York office during the month of June, 1913?

A. That is down here. I will have to get it out and figure it for you.

Q. Give us the items of it.

A. I believe you said the New York office.

Q. What did that consist of?

A. I have not the voucher before me and I cannot say.

Q. What is the next item?

(Testimony of F. G. Ernest Lange.)

A. Thirty-seven dollars and fifty-five cents.

Q. What is the next item? A. \$1.60.

Q. What were the salaries during that time?

A. I cannot say without the voucher.

Q. Was there a salary of \$500.00 a month paid to the salesman at that time? A. There was not.

Q. What was the salary of the manager of the New York office?

A. For a certain portion of the time it was \$350.00 a month, then \$500.00 a month, and then \$125.00 a month.

Q. Was it necessary to have a five hundred dollar a month man there in order to sell 2000 bales of Co-sunnes hops?

A. I did not hire the man, but the man was an expert salesman, or considered as an expert salesman and that was the salary given him.

The COURT.—What was the occasion for a difference in the salary of \$350.00 a month a part of the time and \$500.00 later on. Was it owing to the condition of the market or what?

A. No, sir, his salary was increased at that time. After he had been with us for some time, at a certain time his salary was increased. At the end of March 1913, that man left us, that is, he left the New York office and went over to our London office, and since there was another man in charge at a salary of \$125.00 a month. [156]

Q. Was the man that you paid a five hundred dollar salary to under a contract which was binding on November 4th? A. Yes, an oral contract.

(Testimony of F. G. Ernest Lange.)

Q. And that period has not expired?

A. No, sir. I would not say that there was a contract as to the length of time, but there was an agreement as to his salary. I do not know whether there was a stated salary. The salary of \$500.00 continued about three of the months after November, 1912; January, February and March, 1913, the salary was \$500.00. In November and December he got \$350.00. I do not know why the salary was raised. The number of bales of Cosumnes hops on hand December, 1912, was 1246. I do not know where Pabst goods were at that time.

Q. Can you find out for us? A. Yes.

The COURT.—What is the materialty of this?

Mr. POWERS.—There are certain freight charges that are made on these goods. Our understanding is that they were shipped from one place to another. I want to check them over.

Mr. DEVLIN.—What is the total of those freight charges on these trips?

A. There was the freight to the east to the original point, and there was the freight transferring from one warehouse in one state to a warehouse in another state. That is the local freight.

Q. On January 1st, 1913, how many Pabst goods were on hand unsold?

The COURT.—I regard this as very immaterial, unless you show me that it is material.

Mr. POWERS.—They raised the salary of the New York man when the amount of goods was less to be sold, and it shows that there was no connection

(Testimony of F. G. Ernest Lange.)

whatsoever between the amount of Pabst goods to be sold and the expenses. [157]

The COURT.—That does not make any difference. A man transacts his business in a certain way. There comes a time when he feels that an employee's services are worth an increase in salary. Now the particular condition of the business with reference to any one transaction is wholly immaterial. It is immaterial as relating to a particular transaction except in so far as it may properly be charged to the proportional amount of the entire expenses of that transaction. I cannot permit you to go into this in such minute detail.

Mr. POWERS.—Exception.

Exception #53.

A. The salary of the manager of the Chicago office was \$350.00 and he had an assistant whose salary from November to July was \$975.00. The salary of the assistant in the New York *office* in June, 1913, was \$125.00 and we continued to employ him after the Pabst goods were sold. Mr. Slager was either selling or endeavoring to sell hops. I did not see any of the services performed. The next item is \$15.00 for secretary's salary.

Q. What services, if any, did the stenographer perform with reference to the Pabst goods if you know of your own knowledge?

A. You are segregating an item according to the Pabst goods when all of the services were rendered for all of the goods that were sold at that time.

Mr. POWERS.—I move the answer be stricken

(Testimony of F. G. Ernest Lange.)

out as not responsive to the question.

The COURT.—Motion denied.

Exception.

Exception #54.

Q. You do not know what services he performed, if any with reference to the sale of the Pabst goods at that time?

Mr. COURT.—It would not make a particle of difference. [158]

Mr. POWERS.—I want to get at a few of these items. With refernce to the various items that go to make up the \$37.50, for instance, exchange, December 31st, seventy-five; stamps for office, \$4.00. You have no means of knowing what those stamps were used for, or what that exchange was for, of your own knowledge?

A. As far as I am concerned, I was not there watching the stamps go out, but I can say what the stamps were probably used for.

Q. You do not know of your own knowledge?

A. They must have been used to pay the postage on letters. Other than that I do not know.

The COURT.—They may have rolled them up and made cigars out of them?

A. I do not know. That is the regular office expense.

Q. What connection those expenses had to the 2000 bales, or the 16 bales that were left on hand at that time you do not know anything about?

A. We did not apply them to any particular hops.

A. You yourself do not know about what those

(Testimony of F. G. Ernest Lange.)

expenses were for?

The COURT.—Of your own knowledge?

A. I know what they were for. This is a part of the expense of running the New York office.

Q. Of your own knowledge you do not know what they were for, the expense of the stamps?

A. I do not know.

The COURT.—I presume you are asking these questions for the purpose of moving to strike this out on the ground that he is testifying to hearsay?

Mr. POWERS.—Yes.

The COURT.—The motion is denied.

Q. Your answer would be the same as far as all of the other items are concerned of the New York office, would it not? [159]

A. In reference to my knowledge of them. I know nothing about them other than these are expenses for running the New York offices. These are the expenses we paid to our men, and they came to us and we entered them in our books.

Q. But whether any portion of those expenses were applied towards the sale of the Pabst goods, or directed towards the sale of other goods, you do not know?

A. They were directed against the sale of the Pabst goods and other goods, whatever hops we had to sell at that time.

Q. Do you personally know what was done with reference to whether there was any segregation or not of any portion of those expenses for these particular Pabst goods or not?

(Testimony of F. G. Ernest Lange.)

There are certain traveling expenses of trips taken in those vouchers, are there not?

A. Yes, there are. Here is one for \$11.20 for hotel bill, meals, fare, car fare, public stenographer and berth for Mr. Fleger from Boston, Mass., to Providence, Rhode Island, and New York City.

Q. You do not know what services were performed during that trip by Mr. Fleger?

A. No, sir, I was not with him.

Q. You do not know in what manner, if at all, his services were connected with the Pabst goods?

A. Mr. Fleger is one of our salesmen and was endeavoring to sell hops. During the entire period that he was with us he was trying to sell hops. The Pabst hops were a part of the hops that we were trying to sell.

Q. You do not know of your own personal knowledge whether Mr. Fleger went on that trip, and whether it was taken in connection with Pabst goods or not?

A. No, he may have gone fishing for all I know.
[160]

Q. All you know about it is that it was entered in your books as a part of the expense of selling hops?

A. That is all I know about it.

The COURT.—All of your testimony with reference to these transactions during that period, regarding expenses of these eastern offices, is being given simply as a result of your examination of the books?

A. Entirely.

Mr. POWERS.—I move to strike out all of the testimony of the witness as to overhead expenses on

(Testimony of F. G. Ernest Lange.)

the ground that the evidence on which it is based is hearsay.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

Exception #55.

Q. Will you turn to some of those vouchers, and give us one or two more of the items so that we will know the character of the items that are included in this. I show you an item dated November 12th, 1912. What does that refer to?

A. Expenses of I. G. Markwart to Chicago.

Q. What does that include?

A. Stamps for samples, car fare and printing bill.

Q. How do you know that printing bill was for stationery that was used after June or not, after June 1913? A. I do not know.

Mr. DEVLIN.—How much does that amount to?

Mr. POWERS.—\$18.

Mr. DEVLIN.—Well, take the \$18 off of the 4000 right now.

Mr. POWERS.—I show you now under another item under date of December 24th. What does that refer to?

A. A. J. George, Expense slip No. 9 from Chicago, For Christmas presents \$13.50. [161]

Q. Have you any means of knowing whether those Christmas presents were to people who were trying to sell Pabst goods or not?

A. No, one of them, the largest item, was for the office stenographer.

Q. Do you know whether that was paid for the

(Testimony of F. G. Ernest Lange.)

purpose of attempting to get the office stenographer to do better for the general welfare of the business, or whether it was done for the Pabst goods?

A. It was paid her in the general and ordinary run of business. Another item is I. G. Markwart, from Green Bay, Wisconsin, December 25th and 26th, 1912, includes car fare and telephoning. This last is generally samples of the expenses.

Q. What was the gross amount of the business done in the Chicago and New York offices from November 4th, 1912, to July 1st, 1913?

A. 3,882 bales of hops.

Q. How much of the expense incurred was incurred for the purpose of maintaining that establishment and having it ready to do business the following year? A. I do not know.

Q. How much of it was incurred to finish up business that had been inaugurated prior to November 4th, 1912? A. I could not say.

Q. How much of it was incurred because of contracts that were in existence on November 4th, 1912, and had to be carried out because of the existence of those contracts?

A. I do not know that there was any. The New York offices are rented and it is necessary to maintain an office prior to November 4th, 1912, and thereafter.

Q. It is a costly matter to assemble an office force, is it not?

Mr. DEVLIN.—This is objected to as hypothetical, vague, indefinite and uncertain.

(Testimony of F. G. Ernest Lange.)

Mr. POWERS.—To show that a portion of this expense was for the purpose of preventing the office force from being disseminated and thereafter got together, and that there has been no allowance for [162] that purpose. I am showing that the method of computation is wrong. I am trying to do that if I can. A portion of this expense should be charged generally to up-keep, and not to these two lots of hops that were on hand at the time is my theory.

This witness has testified that there was a certain number of hops on hand. He has divided the hops into two lots. The Pabst lot and those which were not the Pabst lot. He has proportionated the expense of the selling of those two lots among two offices without taking into consideration the fact that a part of that expense was due to the general up-keeps of the business. I am trying to show that is not a very fair way of proportioning that expense, because a certain portion of it was necessary for the holding of the office together, keeping it from being separated, and then having to pull it together again for next year's business.

The COURT.—I do not think that *it* tenable.

Mr POWERS.—Exception.

Exception #56.

Q. Was there not a large amount of expense made at that time for the purpose of keeping together the office force and holding the offices which you had at that time?

A. Well, no. These expenses are regular office expenses. They are expenses incurred in selling hops.

(Testimony of F. G. Ernest Lange.)

Q. If there had been no Pabst to be sold by Horst, what would have been the expense of the New York office?

A. I could not say. If I remember correctly we did not have an office in New York every year. I believe we had one in 1911. I could not say whether we had one in 1910. We kept the office after July 1913, and all the Pabst goods were sold. I could not say whether the same stenographer remained there and the same clerk because I have not examined the records. [163]

Q. Will you give me the amount of the general expenses for the office for the month of July, 1913, and then we can see how they differed from the month of June.

The COURT.—I do not think it will be material if it were here, to tell you the truth, Mr. Powers.

Mr. POWERS.—I will take your Honor's ruling on it.

The COURT.—If you are going to get it here, then I will rule on it. I do not believe it would be material.

A. I would have to go to San Francisco, and it would take possibly a couple of days to get it.

Q. Have you got the report of the warehouse holdings during the month of November, December, January, etc. to July, so far as they effect the Pabst goods? A. I have not that.

Q. When can we have that?

A. I believe I can get it for you to-night.

Q. There were a certain three bales that were sold

(Testimony of F. G. Ernest Lange.)

to Mr. W. P. Downey, Montreal, Quebec. Do you know where they came from?

A. From New York. I believe the North River warehouse, or the Terminal warehouse, New York.

Q. Where did the goods come from prior to going to that warehouse? A. The Cosummes Ranch.

Q. When did they get to that warehouse?

A. I have not got the record here.

Q. Were they submitted to anybody else prior to being submitted to Mr. Downey?

A. I could not say off hand, but I am quite sure they were not.

Q. Were they a portion of the goods from which the samples 1 to 20 came?

A. I do not know whether the samples came from those particular bales, they are the same grade, and same particular bales. I believe [164] the fifty bales sent to the Stiel Brewing Company were in one of the New York warehouses, either the North River warehouse or the Terminal warehouse. I cannot tell you when they left the warehouse.

Q. We want to know which of these goods have been rejected, and whether or not the Pabst people were given goods that had been rejected, and the 1000 bales that were not given to Pabst were goods that had been rejected. I want to know the history of each of the bales you designate as Pabst goods. For that reason I will want to know where they were stored. I move that all of the evidence of the witness with reference to overhead charges be stricken out on the ground that it is dependent upon items

(Testimony of F. G. Ernest Lange.)

that are not shown to be in any manner connected with the Pabst Brewing Company's goods, or the goods that Horst set aside for the Pabst Brewing Company, or designated to fill the order of the Pabst Brewing Company, and that it is based upon hearsay evidence of expenses by the other parties, and is immaterial and irrelevant, also a conclusion of the witness as to the particular amount to be charged, based upon matters that lie partly in law and partly in facts, and also calling for the opinion of the witness.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

Exception #57.

There were two lots 523 and 524 in the Sibley warehouse. They were designated as Pabst goods by the Horst people.

Q. When were they made the basis of any charge against the Pabst account?

A. When we made up our list of sales on the 2000 bales. Just since we have been getting up the statements of the account you have asked for. [165]

Q. What other Horst Cosumnes goods were then in the Sibley warehouse in the year 1912?

A. 100 bales, Lot 517.

Q. When did you put them in there?

A. December 16th, 1912.

Q. You cannot, then, give us from your original records where the 2000 bales, or the 1346 bales that were set aside,—that were sold for the Pabst Brewing Company account were stored on November 4th, 1912?

(Testimony of F. G. Ernest Lange.)

A. I do not have it here. That is in several books and it would take some time to point that out to you, but I can do so.

Mr. POWERS.—That is the principal thing I have been asking for for three days.

The COURT.—You want to be able to verify the fact that they were all Cosumnes hops?

Mr. POWERS.—Yes. And our information is that some of these had been rejected, taken back and sold to different people. We want to be able to find out whether the 2000 bales that were set aside by Horst were rejected goods or not. We want to follow the goods from their origin to their place of departure. I want that so that I can continue my cross-examination of Mr. Horst at as early a date as possible.

Q. Will you give me the figures from which you get that overhead charge?

The COURT.—You cannot spend that indefinite time on items like that. I think you have exhausted the subject.

Mr. POWERS.—I want the figures that produce 4400 odd dollars so that I may check them off.

A. October, New York and Chicago expenses were \$12,862.17. During that time there were 1346 of Cosumnes hops; 2,536 bales of other hops, making a total of #,882 bales, at an average selling price of \$3.31 3/10 per bale, or a total selling cost of the 1346 bales, proportionately [166] \$4,459.30.

Q. I have not asked about this 2536 bales that forms the other factor. I want know how to check

(Testimony of F. G. Ernest Lange.)

up the accuracy of that amount. Where did you get that 2536 bales? A. The sales book.

Q. Is that sales book available to be examined?

A. No, sir, it is not here. This is the book I was speaking about this morning.

Mr. DEVLIN.—We will get it for you as long as you want it.

Q. How many bales did he have at the beginning of the season approximately? A. I could not say.

Q. More than 10,000? A. I do not think so.

Q. And the expense of the office ran on just the same?

A. Yes, but the salesmen, who caused the largest expense left in March.

Q. What was the other item you testified to as making up the expense to be charged to the Pabst goods?

A. \$177.25 insurance. Coast storage, \$153.50. Freight on tare, \$188.43. Interest \$1185.63. Eastern miscellaneous charges, \$549.63. Brewer's discounts and losses on bad accounts, \$294.55. Losses on bad accounts, uncollected accounts, \$1896.70. Interest on those same uncollected accounts \$169.79. Loss on 2000 bales between the price sold to Pabst and the price at which we sold them to other parties,—in other words, the price realized, \$23,584.80, making a total of \$32,651.73, plus several items which I have not charged for.

Q. Now, with reference to brewer's discounts in the amount of \$294.55, what are the items of that?

A. There were two invoices. 1% discount to the

(Testimony of F. G. Ernest Lange.)

Eagle Brewing Company at Utica, New York, and a 1% discount—the price per pound [167] was 17½ cents. Delivered at Utica, New York, and the freight was \$2.25 for 100 pounds. I believe they were shipped from New York, in November, 1912. I cannot give you the date. The other item was one per cent discount to the Gulf Brewing Company at Utica, New York. Bad debts \$32.56, uncollectible claims, the Menasha Company, invoice amounted to \$33.33. We collected \$21.90. Our loss was \$11.43. The Stroudsberg Brewing Company's invoice amounted to \$358.25. We collected \$107.40, and our loss is \$250.76.

Q. Were those two lots of goods segregated as Pabst goods before the loss or after the loss?

A. They were Cosumnes hops delivered after November 4th, 1912. They were of the three thousand bales on hand at that time.

Q. And lots could have either been out of the 1000 bales that was not designated as Pabst's or the 2000 bales designated as Pabst's?

A. No, because this is a sale made after November 4th, 1912. All our sales after November 4th, 1912, of Cosumnes hops were Pabst goods. They were the same class of hops, the samples of the same hops, the same grade, everything.

Q. Until you commenced to prepare for this lawsuit, you did not set aside any goods as Pabst's goods, did you?

A. On November 4th, 1912, we had more than 2000 bales on hand. After November 4th, we deliv-

(Testimony of F. G. Ernest Lange.)

ered those hops to different people. Some of them we had losses on. There were two unpaid accounts. There were four parties we had losses on. I have a list here of every sale made by the plaintiff from November 5th, 1912, until the end of the season, of the Cosumnes sales, and they are marked on that list, and all of the Cosumnes sales after November 4th, 1912, that is, from November 5th on, are included in that 2000 bales of Pabst hops.

Q. Where are the sales of those 1000 bales?
[168]

A. Those were previous deliveries.

The COURT.—He has mentioned that several times that they had contracts outstanding, and had to fill them.

A. Those were previous deliveries.

Mr. POWERS.—I want to check over from the entries in the books what the witness has testified to. Where is the record of the 1,000 sales?

A. In our sales book. The insurance on 1503 bales was the average time of 79 days; on 497 an average time of 41 days; that average time is the time between November 4th and the date of delivery. In other words, we had the 1503 bales 79 days and the 497 bales an average of 41 days.

Q. How is the storage figured?

A. It is figured from November 4th, until the day the hops were shipped from our warehouse on the ranch. For the time they were there, we charged the storage rate of 10¢ per month, and the amount of that storage is \$153.50.

(Testimony of F. G. Ernest Lange.)

The witness gave counsel a copy of the list as follows:

Storage.				Coast.	
In Warehouse of E. Clemens Horst Co.					
Lot.	Bales.	Shipped.	Months.	Storage @ 10¢ Mo.	
		1912.	1912.	Amt. Storage.	
523	100	Nov. 13	1	\$10.00	
524	100	“ “	1	10.00	
472)					
476)	116	“ “	1	11.60	
473	100	“ 14	1	10.00	
516	100	“ “	1	10.00	
519	5	“ 11	1	.50	
454	22	“ 12	1	2.50	
470	100	“ 15	1	10.00	
519	33	“ 19	1	3.30	
522	42	“ “	1	4.20	
517	100	“ 16	1	10.00	
		1913.			
525	13	May 13	7	9.10	
526	18	“ “	7	12.60	
Var. to L. D.		Mar. 12	5	32.50	
Jacks 65					
476	5	“ 21	5	2.50	
471	50	Feb. 4	3	15.00	

Total Coast Storage.....\$153.50

[169]

Q. What became of Lot 523?

A. Three bales went to a claim against the railroad. The hops were damaged on the way, damaged some way or other. We delivered them to the railroad company and made a claim out for them. 91 bales went to Cleveland and Sandusky Brewing Company, at Cleveland, Ohio.

Q. What was the price they were sold for?

A. 16½ cents delivered in Cleveland.

Q. What became of this claim on the 3 bales—what became of that claim?

The COURT.—Tell me the materiality of that?

Mr. POWERS.—Apparently they were sold to the railroad company, and a charge is made here for

(Testimony of F. G. Ernest Lange.)

their storage. Apparently those goods were sold to the railroad and do not appear to be put back here.

A. They were in the warehouse and we charged storage on them.

Q. You made some claim against the railroad company for damages on them?

A. Yes. I believe the claim for damages to those hops was paid. I have no credit for it here. I will have to examine the books to find out. These three bales were included in the coast storage. The miscellaneous charges cover these hops and other hops. Other lot numbers are marked on them. I have crossed with a blue pencil the Cosumnes hops on which they are charged. All this other has been kept out. Now as to the uncollectible accounts there were two bills to the Park Brewing Company. One amounting to \$162.63, and the other \$426.67; and one to the Eastern Brewing Company for \$1307.40, are unpaid accounts. [170]

Reference to Storage.

The storage on Pacific Coast was 969 bales of hops.

Q. Where are the other 600 bales of hops?

A. They were en route to the east and were at Milwaukee, Chicago and New York.

Q. Now, if the Pabst goods were to be delivered from Milwaukee, why were any of the goods that were available shipped to Pabst from New York?

A. I do not know.

Q. You did not have 1500 bales on hand in California to ship to the Pabst Company on November 4th, 1912?

A. No, sir. Lot 524 were stored in our Cosumnes ranch. It was stored in our warehouse on the ranch.

(Testimony of F. G. Ernest Lange.)

Q. When did the other bales of that year's crop leave the warehouse?

A. Between the time they were harvested and November 4th.

Mr. DEVLIN.—I offer these calculations, as to interest, storage, freight on tare, insurance, local freight, in evidence.

The said calculations were as follows: [171]

INSURANCE.

On Cosumnes Hops from Nov. 4/12 to Date of Delivery to Buyer.

Bales.	Days.	Bales.	Days.	Bales.	Days.
3	11	4	50	10	230
50	18	20	103	5	228
5	17	6	88	8	230
98	52	10	131	5	243
1	9	3	72	3	253
100	34	97	82	50	92
				<hr/>	
25	11	85	93	1503 Ave. days 79	
3	11	33	72		
1	12	6	72		
25	22	91	73		
5	17	2	77		
10	21	1	96		
10	21	1	103		
1	16	42	87		
15	17	15	107		
10	19	52	104		
5	17	8	103		
50	41	50	114		
20	18	25	109		
10	41	65	116		
1	238	15	126		
25	40	35	131		
5	56	2	140		
6	65	25	161		
1	46	10	136		
1	174	2	126		
2	225	5	131		
1	116	1	136		
20	54	6	146		
15	49	1	159		
2	41	38	165		
92	77	1	179		
44	47	3	189		

1503 Bales @ 37.20 per bale=\$55,912 @ \$1.25 per \$100.00 P/A for 79 days= Insurance \$151.27.

Bales. Days.

75	91
116	19
80	112
20	56
15	33
100	1
91	7

497 Avge. days 41.

497 Bales @ \$37.20 per bale=\$18,500.00 @ \$1.25 P/A for 41 days=Insurance \$25.98.

[172]

FREIGHT ON TARE.

(Tare=5 lbs. per bale)

Bales.	Lbs. Tare.	Frt. Rate. Per 100 #.	Amount.
859	4295	\$1.75	\$75.16
3	15	2.30	.35
61	305	2.09	6.37
20	100	1.89	1.89
137	685	1.94	13.29
101	505	1.93	9.75
25	125	1.97	2.46
30	150	2.14	3.21
10	50	2.55	1.28
51	255	1.95	4.97
10	50	2.04	1.02
1	5	2.80	.14
11	55	2.05	1.13
12	60	2.11	1.27
20	100	2.19	2.19
20	100	2.23	2.23
92	460	2.38	10.95
4	20	2.06	.41
20	100	2.65	2.65
6	30	4.70	1.41
110	550	2.03	11.17
11	55	2.28	1.25
97	485	2.21	10.72
85	425	1.90	8.08
2	10	2.15	.22
21	105	2.25	2.36
1	5	2.01	.10
27	135	2.20	2.97
5	25	.20	.05
13	65	2.10	1.37
5	25	2.02	.51
50	250	3.00	7.50

1920

[173]

\$188.43

INTEREST.
IN DELIVERIES OF COSUMNES HOPS
From Nov. 4, 1912 to Date Mentioned Below.

Name.	Amount.	Date Paid.	Int. @ 6% From Nov. 4/12.	Days.
		1912.		
W. P. Downey	\$ 92.86	Dec. 31	\$.88	57
Steil Brg. Co.	1314.61	Dec. 11	8.15	37
Park Brg. Co.]	162.63	Unpaid		
"	426.67	"		
		1913.		
Springfield	2374.40	Jan. 9	26.12	66
F. W. G. & Co.	30.00	Jan. 15	.36	72
Narragansett	3020.56	Jan. 10	33.83	67
Rothaker	742.02	Mar. 24	17.29	140
Gutsch	91.80	Nov. 30	.39	26
Pulkrabek	30.15	Jan. 31	.59	118
Haffen	678.75	Dec. 9	3.94	35
Medina	164.38	Dec. 23	1.35	49
Geo. Cooke	308.38	Jan. 27	4.32	84
Florida Brg. Co.	306.39	Dec. 31	2.91	57
F. W. G. & Co.	295.84	Dec. 31	2.81	57
Sandkuhler	32.64	Nov. 30	.14	26
F. W. McGowan	158.73	Nov. 27	.60	23
Boston Beer	1420.03	Feb. 28	27.41	116
Eastern Brg.	1307.40	Unpaid		
Kuhlmann	299.83	\$99.73 Apr. 16	2.70	163
		200.10 June 17	7.50	225
Bruyndonckx	30.00	July 1	1.19	238
F. W. G. & Co.	684.00	Dec. 23	5.61	49
Lauer Brg. Co.	130.24	Dec. 31	1.24	57
Centerville	175.23	\$85.00 Feb. 17	1.49	105
		90.23 July 26	3.96	264
Consumers	31.45	Jan. 25	.43	82
"	29.89	Mar. 11	.63	127
"	31.57	May 7	.97	184
"	60.90	June 30	2.41	238
Henderson	493.55	Jan. 25	6.76	82
Medina	50.00	Apr. 14	1.34	161
"	50.00	May 19	1.63	196
"	50.00	June 7	1.79	215
"	124.42	June 17	4.67	225
"	50.00	June 30	1.98	238
"	150.00	Aug. 26	7.37	295
		1912.		
F. W. G. & Co.	53.65	Dec. 21	.42	47
Haffner	2600.94	Jan. 28	36.93	85
Steiner	1155.65	Jan. 6	12.13	63
Jefferson	120.48	Feb. 10	1.96	98
Mobile	531.53	June 10	19.29	218

Name.	Amount.	Date Paid.	Int. @ 6%	Days.
			From Nov. 4/12.	
Silverton	166.00	Mar. 14	3.60	130
Centlivre	311.84	Mar. 30	7.58	146
Frostburg	98.22	Apr. 14	2.63	161
Cleveland Sand.	2837.85	May 5	85.98	182
Aurora	2438.09	May 19	79.72	196
Steiner	997.76	Jan. 28	14.16	85
Atz	177.48	Jan. 25	2.43	82
Steiner	2585.40	Jan. 24	34.90	81
Staemele	63.82	Jan. 24	.86	81
Wenner	30.72	Feb. 18	.54	106
1914.				
Menasha	21.90	Jan. 26	1.63	448
[174]				
1913.				
Smith Capron	\$1257.00	Feb. 13	\$21.11	101
Cooke Brg. Co.	408.30	Mar. 11	8.66	127
Manhattan	1473.16	May 14	46.85	191
Frostburg	94.67	May 31	3.29	208
"	50.00	June 30	1.98	238
"	50.00	Aug. 8	2.30	277
"	42.43	Sept. 29	2.33	329
Camu & Fils	1483.85	Mar. 31	36.35	147
Smith Capron	690.45	Feb. 28	13.33	116
L. D. Jacks	1727.05	Apr. 22	48.70	169
Altoona	460.67	Mar. 29	11.15	145
Yale	1029.28	Apr. 14	27.62	161
Allegier	119.64	Apr. 9	3.11	155
Johnson	682.17	June 23	26.26	231
Cataract Co.	285.16	Apr. 25	8.20	172
Hopkins	49.40	Mar. 25	1.16	141
Bauer Schweitzer	123.62	Apr. 22	3.49	169
McHenry	28.90	Aug. 18	1.38	287
Centerville	75.00	Sep. 15	3.94	315
"	75.80	Sep. 25	4.10	325
Husting	34.93	Apr. 21	.99	168
Hupfels	937.04	May 31	32.52	208
Vogls Indep.	35.00	June 19	1.32	227
Atlas	71.95	July 26	3.17	264
Atlantic	259.23	(1914) Feb. 16	20.25	469
Gamble	120.49	(1913) June 30	4.77	238
Lykens Brg. Co.	212.76	Aug. 11	9.94	280
Strondburg	107.47	(1914) Mar. 19	8.95	500
Yale	73.12	(1913) Aug. 16	3.54	285
Sutherland	685.53	Feb. 10	11.17	98
"	690.87	Mar. 7	14.16	123

 \$875.61

Name.	Amount.	Date Paid.	Int. @ 6%	Days.
			From Nov. 4/12.	
Cream City	2204.39	Mar. 11	46.73	127
Gottfried	1640.29	Mar. 31	40.18	147
"	1706.29	May 14	54.26	191
Cream City	2514.78	Apr. 30	74.19	177
Hohenadel	322.56	Feb. 28	6.23	116
"	276.81	Mar. 31	6.78	147
Krantz	417.00	June 3	14.64	211
Eagle	2243.04	Nov. 27	8.52	23
"	961.26	" 13	1.44	9
U. S. Brg. Co.	2860.00	Mar. 4	57.20	120
			<hr/>	
			\$310.17	

[175]

Mr. POWERS.—I will object to that as irrelevant, incompetent and immaterial, unless they are connected with the 2,000 bales of hops that were specially set aside as and for the Pabst shipment after some definite time, so that there will be some means of knowing that they were properly charged against Pabst.

The COURT.—Let them be admitted.

Mr. POWERS.—Exception.

Exception #58.

[Testimony of F. V. Flint, for Plaintiff.]

F. V. FLINT.

Direct Examination by Mr. DEVLIN.

I have examined samples 1 to 20 and 25 to 38 sufficient to enable me to testify. I am a hop grower and buyer of hops. I have been engaged in the buying of hops for 22 or 23 years. I do business under the name of Flood V. Flint & Company, dealing in all kinds of California hops, including Cosumnes, American River hops, Russian River hops, Tehama and Yuba County hops, and have become more or less acquainted with the market prices of hops as a part of my business. Have sold hops to merchants.

(Testimony of F. V. Flint.)

I am also a hop-grower on the Cosumnes River, 22 miles from here, and about 3 miles from Horst's ranch. I have about 1300 acres in the season of 1912, on which are grown hops called Cosumnes hops. I have *then* engaged in the raising of hops for about thirty years. My father was raising hops before me. I am familiar with the picking and curing of hops and the like. In the year 1912, Mr. Horst submitted certain samples purporting to be Cosumnes hops to me and I examined them, and I also examined samples of hops numbered 1 to 20 sent by the Horst Company to Pabst, and also samples 25 to 38 sent by plaintiff to defendant. The examination was made to ascertain the condition as to their being choice or not. I found them to be choice. [176]

It is very difficult to tell the condition of a hop two years after it has been picked. Because they lose their brightness and also lupulin, also in color and flavor and they become old. I should not consider it a fair test to determine the value of hops two years after the hops had been grown, by the examination of the samples at this day. I did not split them wide open, but I examined them. I examined them to see whether they were clean picked. As far as the trade usage is concerned I consider them cleanly picked.

Q. What do you understand by the word "choice" as used in the hop trade?

A. It is the best average quality. It must be a sound hop. There is a grade of hops known to the trade as fancy. It is seldom used. I placed my initials on some of the samples submitted to me in

(Testimony of F. V. Flint.)

1912. I would call them choice hops.

Q. What was your judgment in regard to the other samples that you examined, in regard to their quality?

A. I declared them choice. Beginning with the fall of 1912, there was a fall in the market. It was falling right along. There is no place where hops are sold by auction. They are sold by contract and personal solicitation. It is not ordinary or customary to sell by auction. Hops are sold either by paying commission or salary. You generally pay a commission of so much per pound, one cent, 1½ cent, or two cents per pound. It would take some time in the condition of the market in 1912 to sell 2,000 bales of hops, because it was late in the season, and England would not take any more of our hops. It was difficult to sell a large quantity outside of the United States, and it would have been very hard to sell them. You would have to force them upon some one. Make him a bargain price, or something of that kind, in order to sell them. It would take a long time. [177]

If in November, 1912, 2,000 Cosumnes hops were given to me to sell I would try the markets in the principal cities of the United States. I would send forth circulars and send forth men. There is considerable difference between air-dried and kiln-dried hops. I do not know whether I could tell the difference or not. I might get stuck on it but there is a big difference. There are two different processes. The Russian River hops and the Cosumnes hops have about the same reputation. About one-half of the

(Testimony of F. V. Flint.)

crop is sold in advance.

Cross-examination by Mr. POWERS.

I am a friend of Mr. Horst, and connected with him in business to the extent that I own stock on an enterprise that he does, that is all. We are in the same line of business. I do not do a great deal of business with him. I was selling hops in 1912.

Q. In November, 1912, were choice hops in demand?

A. No, not in demand. Occasionally, yes, you would get an order, you know, I do not sell much to brewers. I have not much of a brewery trade just at present. I sell to merchants, and they sell to the brewers.

Q. Were not the merchants looking for choice Cosumnes hops at that time?

A. There may have been an order. As a matter of fact I did not sell one bale during the month of November and the month of December. I sold some in October.

Q. Choice Cosumnes hops?

A. I will refer you to my list. I just made a short memorandum. I cannot recollect whether they were choice or not. Yes, January 15th, I sold some hops—100 bales. I considered them choice.

Q. Medium Cosumnes at times were a drug on the market, but choice Cosumnes were in demand?
[178]

A. Choice hops are always in demand. They always want choice hops.

Q. Was there a falling market at that time for

(Testimony of F. V. Flint.)

choice Cosumnes hops?

A. There was a falling market for all classes of hops.

Q. Did you look at the samples that had blue string tied around them? A. Yes.

Q. Does not that tend to prevent your seeing the color?

A. I examined the samples by looking at the top and the bottom. We turned them up in this way at the corner. I looked at the edge and I looked at the top and I split them this way as far as I could look into them. That is the way I look at a sample when I am called upon to look at them. I look them all over as well as I can.

Q. Is that the usual form of a commercial sample?

A. No, I do not think so. It differs from usual commercial samples because it has a blue string around it and pasteboard on the bottom. You usually send a larger size to merchants so that they can cut them up and make other samples from them. This is the usual size of a sample that you send to a brewer; they are made in that size so that you can carry them in your pocket, or mail them. The fact that it has a blue string on it does not have any effect upon its color. If it was green it might. A blue bottom like that might help the sample and show it off a little better by giving it a little shine.

Q. Were these samples a very high-grade hop or just medium hops that you examined?

A. They were choice hops.

Q. Were they cleanly picked?

(Testimony of F. V. Flint.)

A. They were sufficiently cleanly picked and I called them choice.

Q. With reference to sample two years old which has been kept in cold storage, and not broken into and handled, would the general appearance of the berry so far as its soundness, regularity and [179] color was concerned, still be apparent?

A. While it is in cold storage, yes. Two years is a pretty long time. I do not know that I am capable of passing on that. It would take the brightness or shine away from them after two years. I do not—whether it would effect the uniformity of color.

Q. What is a choice hop?

A. It is a sound hop. That means that it is handled properly, picked properly, dried properly, cleanly picked and handled properly in every way. Good even color. It may be greenish, light green, or it may be yellow, or it may be a greenish yellow. These samples are a greenish yellow. In a large quantity of hops they would not be just one like the other. The samples would represent the lot. They must be fat in lupulin and must be taken care of just the right way, thoroughly dried and yet not slack dried. This must be determined by inspection and examination of the hop.

Q. If the entire crop of a district was mouldy, would there be any choice hops that particular year?

A. The best average hop.

Q. If there should be no hops up to that quality, there would be no choice hops then? A. No, sir.

Mr. POWERS.—Choice, then, is a purely relative

(Testimony of F. V. Flint.)

term, is that it? A. Why, yes, I should say so.

Q. And if by chance the berries were not sound, then the best hops that were there would be considered choice hops? A. Yes.

The COURT.—You need not ask any more questions on that subject. You have exhausted it.

The commission is what you make it. You may agree upon any price. The highest priced man is the man you usually regard as the best man to sell hops. I have never made any contract for 2¢ a [180] pound and pay the man's expenses. I could not say that such contracts have been made. That is about the usual price as I understand it. If you want to sell hops you make a contract with the highest priced man and you might pay 2 cents a pound and pay his expenses. The man that is well known among the brewery trade has a certain trade that he can control practically.

Q. To whom have you ever paid 2¢ a pound and expenses?

A. I cannot say, but I think it has been done.

Q. Isn't the usual price one cent a pound?

A. I cannot say that it is.

Q. If the seller sells to dealer, isn't the commission from $\frac{1}{4}$ to $\frac{1}{2}$ cent a pound?

A. As between dealers, it is less. It is $\frac{1}{4}$ cent to the broker.

Redirect Examination by Mr. DEVLIN.

The market price for choice Cosumnes in the month of February, 1913, was about 14¢.

If it is known that a dealer has rejected a quantity of hops, it has a tendency to depress the hops.

[**Testimony of E. Clemens Horst, for Plaintiff
(Recalled).**]

E. CLEMENS HORST (recalled).

Direct Examination by Mr. DEVLIN.

These hops were grown on the Cosumnes River land leased by the plaintiff.

Mr. DEVLIN.—I show you a letter, Mr. Horst, dated September 12th, 1911, and I ask you if that is an office copy of a letter that you sent to the Pabst Company? A. Yes.

Mr. DEVLIN.—Counsel will admit that we gave the regular notice to produce this letter in court.

Mr. POWERS.—Yes. We have made an examination and have been unable to find it. [181]

I recognize this as a carbon copy of a letter addressed to Pabst Brewing Company. I know that a letter was written. It is a reply to a previous letter which has already been introduced in evidence. It is the custom of our office to keep copies of all letters we send and a postage record. I have a book here that shows the postage stamp record kept in the San Francisco office. One of our regular books. I have received no word from the post office that that letter has not been received by Pabst Brewing Company and has not been returned to us. We send all letters out to be posted in the same way. Other letters sent to Pabst Brewing Company in the same way have been received by them. They all followed the usual routine.

Mr. DEVLIN.—I offer this letter in evidence.

Mr. POWERS.—We object to its introduction

(Testimony of E. Clemens Horst.)

unless it be shown that the Pabst Brewing Company received it.

Mr. DEVLIN.—(Q.) You will not insist on my bringing the office boy here? If he were here he would testify that he mailed all of the letters referred to in that book. We will admit that the letter was mailed in the usual course of business.

The letter is read in evidence.

That is the reply we sent back to Pabst Brewing Company to the orders they sent to us. The letter reads as follows:

Sept. 12th, 1911.

In reply refer to H-37957.

Pabst Brewing Co.,
Milwaukee, Wis.

Gentlemen:

Enclosed herewith we return you purchase orders #54807/8 covering 500 B/-1911 Air Dried Cosumnes Hops and 2000 B/-1912 Air Dried Cosumnes Hops.

We have already sent you Hop contracts signed by us and covering the above, and are now awaiting their return when signed by you.

Yours faithfully,

ECH/J.

E. CLEMENS HORST CO.,

Encls.

E. C. HORST. [182]

Together with this letter was enclosed the two purchase orders therein referred to.

Cross-examination by Mr. POWERS.

Q. Did you ever receive any reply to this letter of September 12th, 1911?

A. Yes. When I was in Milwaukee in December,

(Testimony of E. Clemens Horst.)

the Pabst people told me—I am trying to remember which man it was—I can tell you who were there. There was either Mr. Stark, the secretary, or Mr. Wright, or Mr. Zaumeyer. They told me it was not necessary to do anything further about the contract; as the telegraphic correspondence was ample for the contract, and they had sent me their printed form of contract simply by mistake. That it should not have been sent. I cannot recollect which one of them was there, or whether any of them were there. It took place in the office of the Pabst Brewing Company. The conversation arose in regard to my calling their attention to having put in the two per cent discount and some other things in the printed form that they sent to me. Colonel Pabst was in Milwaukee at that time, but I do not remember whether he was there at the time we had the talk. Nothing was said. They said the telegraphic correspondence was ample and there would be no use of signing any further papers. I do not remember which one of those people that I mentioned did say it. At that time, of course, I did not anticipate any difficulty. This was in December, 1911, a few months after the sale was made.

Q. And the communications which constitute the contract occurred in September? A. August.

Q. When you were last on the stand you said you commenced to prepare for a lawsuit immediately upon the market falling, which would seem to indicate that you expected litigation with the Pabst Brewing Company. Do you know whether the Pabst

(Testimony of E. Clemens Horst.)

Brewing Company ever [183] had any law suit upon the rejection of hops, in your life?

A. I have known they had many rejections, but I do not know of anybody else suing them.

Q. Did you ever hear of a rejection except with your brother's company, the American Brewing Company?

A. I know the general reputation in the trade of Mr. Zaumeyer's inspection.

Q. What other rejections ever took place?

A. I cannot recollect any just now. Give me time and I will give you a line on them.

Q. I would be very glad to have you do so. Do you say that you know of any rejections made by the Pabst Brewing Company except with your brother's company, the American Brewing Company?

A. They do not reject them outright. They simply ask for a big allowance.

Q. Who do they ask to make the allowance?

A. The sellers have to make the allowance.

Q. What sellers have to make an allowance?

A. I told you that I could find it out for you, but I cannot tell you right off-hand.

The COURT.—We cannot consider any immaterial matters of that kind.

Mr. POWERS.—I want to put in my rebuttal that that is not the fact.

The COURT.—He has answered that he does not know the particular instances.

Q. Don't you know that the Pabst Brewing Com-

(Testimony of E. Clemens Horst.)

pany has never rejected any hops except yours and your brother's?

A. I did not say that they rejected them. They simply get an allowance on them.

Q. Don't you know that they have asked for no allowance on hops?

A. I will give you the data to the contrary, but just give me a little time. [184]

The COURT.—You need not bother about getting it, because I would not permit it to go in if it were here. It is a collateral fact.

Mr. POWERS.—Exception to ruling.

[Testimony of W. J. Fielder, for Plaintiff.]

Testimony of W. J. FIELDER.

Direct Examination by Mr. DEVLIN.

I reside at Perkins Station. I am superintendent of the hop ranches of the Horst Company. I have been connected with it since 1896, about eighteen years. I have bought hops, inspected and graded hops and grown hops. Everything connected with it in California, including the curing, selling and buying. I have had experience in Yuba County, Sacramento County and Sonoma County. I saw the hops samples 1 to 20 and 25 to 38. I also saw certain samples that were submitted by Mr. Horst in 1912, purporting to be splits of samples sent by him to the Pabst Brewing Company, of Cosumnes hops. They were all choice Cosumnes hops. The general pick and cure of a hop. Those that were submitted to me in 1912, were good choice hops. The condition was first class.

(Testimony of W. J. Fielder.)

Q. What do you understand a choice hop to be?

A. Good color, average color, and average clean pick. Lupulin good and plenty of it. The hops examined in 1912, came up to these conditions. They were both air-dried and kiln-dried hops. I have been superintendent of the American River ranches for four *year*.

Cross-examination by Mr. POWERS.

Q. Do you pretend to be a hop expert?

A. I have done nearly everything connected with hops. I have not been in the business of buying and selling for myself, but for others. At Santa Rosa I worked for Mr. Dunham during the hops season about two months, in the Sacramento District. He bought them and I inspected them for him as to quality. The samples were tied up [185] and I examined them on the edge. They are the average size sample, not the usual size. It is not usual to have a blue ribbon tied around them. I did not disturb the inside of the sample. Mr. Sickels brought them around and asked me to give a deposition on them and I did it of my own free will. I was interested in seeing the record of Sacramento hops maintained. I am not connected with the Cosumnes hops. I was on the American River. I looked at every one of these samples and gave my judgment. I did not pick them to pieces. They were about what I would call average Cosumnes choice hops. A choice hop has good color, lupulin good, clean hop in general, and good cure. It is an average hop all the way through. Average clean, and has to be an

(Testimony of W. J. Fielder.)

average picked hop. Not necessarily uniform in color. You take the average hops and there will be two or three shades of picking in one season. There may be a little green and a little yellow in the same sample, after they have been in the cooler. There may be several shades of color in a crop of hops. The color of hops need not necessarily be uniform. The sample is taken from the whole crop. Each sample taken by itself should be practically uniform. Any man can pick out a berry of a lighter shade, or a darker shade, from the general appearance of the sample. The uniformity in color does not play much of a part in hops in regard to the choiceness of a sample. Hops should be of a bright color. These hops weer average bright color of Cosumnes hops of that season. To my recollection none of the samples were better than others. As far as the crop was concerned they were practically all the same. If you do not harvest them inside of three or four weeks, they will dry up and blow away. Some of these hops were picked not earlier than the average run of the season. I could not say as to that.

The COURT.—You have exhausted the cross-examination on the subject of these samples. I cannot permit you to go on indefinitely. You have cross-examined the witness sufficiently on the subject of these [186] samples.

Mr. POWERS.—I will save the exception.

Q. With reference to air-dried Cosumnes hops and kiln-dried Cosumnes hops, can you tell the difference between air-dried hops and kiln-dried hops?

(Testimony of W. J. Fielder.)

A. I could up to a certain time. Then they commence to even up. They will age within a month or six weeks, and a person would have difficulty in telling, after they commenced to decrease in their color and everything else. It is not practical to tell the difference between an air-dried hop and a kiln-dried hop after six weeks.

[Testimony of E. Clemens Horst, for Plaintiff
(Cross-examination).]

Cross-examination of E. CLEMENS HORST
(Continued).

On November 4th, 1912, we had three thousand odd bales Cosumnes hops on hand.

Q. State where they were.

A. I cannot state from memory. I can give you the data.

Mr. POWERS.—I move to strike out the testimony of the witnesses with reference to the existence of 2,000 bales at that time because he was referring to records and the records were not produced.

The COURT.—The motion will be denied.

Mr. POWERS.—Exception.

Exception #61.

Q. Mr. Horst, did you buy any Cosumnes hops during the month of November? A. I do not think I did.

Q. Did you not in the latter part of November, 1912, buy some Cosumnes hops from Wolf-Netter & Company?

Mr. DEVLIN.—I object to that as irrelevant, incompetent and immaterial, unless it is confined to

(Testimony of E. Clemens Horst.)

air-dried Cosumnes hops.

The COURT.—Yes, I think so.

Mr. POWERS.—I will take ruling on that, after I call your attention [187] to the facts. The final telegram between the parties *do* not refer to air-dried Cosumnes hops.

The COURT.—I have watched those carefully. I shall instruct the jury that there was no change in the contract in that respect. The objection is overruled.

Mr. POWERS.—Exception.

Exception #62. (Pages 296–297.)

Mr. POWERS.—I would like to call your Honor's attention to another fact.

The COURT.—I have ruled. I have got the whole thing in my head. If I am mistaken you are benefitted by it.

Mr. POWERS.—I will *not* my exception.

The COURT.—I want the case to go along. I do not want to go over those things time and time again. I keep these things in mind as I go along. I will rule on your objections.

Q. Did you buy Cosumnes hops of the same quality as air-dried Cosumnes hops in the latter part of November, 1912?

The COURT.—That is the same question, exactly. You may ask him if he bought air-dried Cosumnes hops.

Mr. POWERS.—The objection is supposed to be made sustained and I except.

The COURT.—It is the same objection. I do not

(Testimony of E. Clemens Horst.)

require it to be repeated.

Mr. POWERS.—Exception.

Exception #63.

Q. Did you buy hops in San Francisco of a character which was accepted by the trade as Cosumnes hops which could have been used as a delivery on the 4 samples numbered 21 to 24, submitted by the Pabst Brewing Company to you?

Mr. DEVLIN.—I object on the grounds heretofore stated, and on the further ground that it is hypothetical, argumentative, and asking the witness to go through a mental process for the purpose of determining whether they would be accepted or not accepted, [188] vague, indefinite and uncertain.

The COURT.—The objection will be sustained. You will confine yourself to air-dried Cosumnes hops.

Mr. POWERS.—Exception.

Exception #64.

The COURT.—This plaintiff was not bound to make any purchases of hops that he might imagine would be accepted under his contract, when they were not the hops that were called for by the contract.

Mr. POWERS.—It is for the purpose of showing that while he sold our hops for 14 and 15 cents, that he bought other hops for 17 cents of the same character, and therefore he did not use proper care in the sale of our hops.

The COURT.—If you have reference to the same character of hops stipulated for in the contract, I will admit it; otherwise I will not.

Mr. POWERS.—It is preliminary, first, that he

(Testimony of E. Clemens Horst.)

bought Cosumnes hops, and then I want to show that they were of the same character commercially as air dried.

The COURT.—I understand you exactly. I will permit you to show that he bought air-dried Cosumnes hops.

Mr. POWERS.—There is no necessity of indulging in any sort of controversy at all about that. I have stated my purpose. May I now renew my objection with the purpose stated, and save my exception. That goes to all the questions.

The COURT.—Yes.

Mr. POWERS.—Exception.

Exception #65.

On November 4th, 1912, we had a variety of hops on hand. I could not tell you what was the percentage of choice, medium or poor. I do not see how I could tell that from our records now. We did not close our office in 1911. I do not know whether we closed in 1910, or not, nor in 1909. I could not tell you that it was closed within the last ten years. On several occasions [189] we closed our Chicago office. I could not tell you when within the last ten years. In Chicago we have kept an office and paid the rent of the office when nobody was there. The office headquarters. We pay the rent for the office. The Chicago rent is \$15.00 or \$20.00 per month. Some small amount like that. We had desk-room and we simply kept on paying the desk-room rent and nobody was there. For the New York office we paid more rent, and on several occasions we have given up the office

(Testimony of E. Clemens Horst.)

altogether. Our Atlas contract refers to any hop that is of the quality of an Oregon hop. We could have delivered Cosumnes hops on that.

Q. Why did you deliver three bales Cosumnes hops at 14¢?

A. This was a contract made at a different time. This contract was made at 28¢ a pound when the market was different. I do not know whether I could have used Cosumnes on that or not. If a man contracts for hops equal to Oregons we can give him Oregons, but we are not bound to give him Oregons.

With reference to the 3,062 bales on November 4th, 1913, there were 1230 bales on the ranch, 400 in Milwaukee, 448 in New York, 639 in Chicago and 345 bales on the way east.

Mr. POWERS.—Show me the record where they were on the ranch.

A. I will get that information for you.

The COURT.—Bring the records that will show where these hops were stored.

Witness produces stock-book and indicates page 211, testifying:

All hops originally were on the ranch and then my books show the date that the hops were ordered out, so the difference between.

A. I cannot give you the dates when they were stored. When they were harvested, they were on the ranch, and the harvesting ran from the beginning of August until the beginning of September [190]—as soon as they were baled.

(Testimony of E. Clemens Horst.)

Q. I want you to state when the 4,500 bales were stored.

The COURT.—The 4500 bales were stored when they are dried and baled.

Mr. POWERS.—I am asking him for the date.

The COURT.—He cannot give you that date. He has told you so time and time again. They were baled at different times as they went along through the season. Moreover this is wholly immaterial, when the 4500 bales were stored.

Mr. POWERS.—Exception.

Exception #66.

WITNESS.—The dates here are going to be kind of mixed up in the respective lot numbers. Here is one bale that was cut up for samples. Lot 511. On March 10th, 1913, there were 14 bales shipped out. March 18th, 15 bales; March 31st, 15 bales; May 16th, 5 bales; November 11th, 100 bales; November 8th, 12 bales; November 13th, 100 bales; January 28th, 1913, 50 bales. Any date between October and December would be 1912, and any date from January to June would be 1913. The March 10th shipment went to L. D. Jacks. The two 15 bale lots went to Perkins. Those were some clean-ups that were rehandled. May 16th, 1913, 5 bales went to New York; November 11th, 1912, United States Brewing Company, Chicago; November 8th, Graff Brothers, 12 bales, lot 469; November 13th, 1 bale, lot 470, went to Chicago; January 28th, 1913, Sutherland & Company, 50 bales, lot number 471; March 31st, George Hermann, 10 bales, lot 471; November

(Testimony of E. Clemens Horst.)

8th, Gottfried Brewing Company, Chicago, 100 bales, lot number 472; November 11th, United States Brewing Company, Chicago, 100 bales, lot 473; November 11th, United States Brewing Company, Chicago, 10 bales, lot 474; November 15th, Krantz Brewing Company 15 bales, lot 474; January 18th, San Francisco, 12 bales, lot 474. They were shipped to San Francisco. I do not know who the customer was. It was not myself. On January 8th, they were shipped to ourselves at San [191] Francisco. March 10th, L. D. Jacks, 1 bale, lot 475. March 18th, to ourselves at Perkins, 14 bales lot 475. Those were some of the clean-ups. March 31st, George Herman, 71 bales, lot 475. That entry L. D. Jacks, February 28th, is a cross-entry. It is on both sides of the book. One entry offsets the other. I do not know what the transaction was. November 8th, Gottfried Brewing Company, Chicago, 10 bales, lot 476. November 18th, Gottfried Brewing Company, 6 bales, lot 476. March 10th, Gottfried Brewing Company, 2 bales, lot 476. March 18th, to Perkins, 3 bales, lot 476. March 19th, Bauer-Schweitzer Hop & Malt Company, 5 bales, lot 476. March 31st, to Perkins, 6 bales, lot 476. November 14th, Chicago, 100 bales, lot 517. October 12th, Hohenade, 30 bales, lot 518. January 18th, San Francisco, 4 bales, lot 518. March 10th, L. D. Jacks, 15 bales, lot 518. May 16th, New York, 1 bale, lot 518.

Mr. POWERS.—(Q.) That means that you shipped to yourself at New York?

A. Yes. November 8th, Walter Brothers, 5 bales,

(Testimony of E. Clemens Horst.)

lot 519. November 7th, United States Brewing Company, Chicago, 41 bales, lot 519. November 5th, Chicago, 33 bales, lot 519. November 11th, United States Brewing Company, Chicago, 59 bales, lot 520. November 11th, 1 bale, lot 520, cut up for samples. March 10th, L. D. Jacks, 14 bales, lot 521. March 16th to New York, 2 bales, lot 521, November 13th, Chicago, 42 bales, lot 522. November 11th, United States Brewing Company, Chicago, 94 bales, lot 520. November 11th, United States Brewing Company, Chicago, 96 bales, lot 524. February 28th, L. D. Jacks, 16 bales, lot 525. March 18th, to Perkins, 7 bales, lot 526; March 31st, 14 bales to Perkins, lot 526. May 16th, to New York, 10 bales, lot 526. Now, the difference between the original crop and these shipped will represent the stock we had on the ranches. [192]

Mr. POWERS.—(Q.) Will you kindly show me any record you have of the existence of 4500 bales of that crop.

A. I will have *to over* this list and see because these figures do not total up 4500 bales. A lot of the stock does not ever reach this stock-book. The entries were made in this book on pages 211 and 212, about the time that these stock movements were made, by Mr. Zipsel. None of these entries have been made in the last month. The entries on the left-hand side represent the records of the stock there, and the right-hand side represents the stock movements out. Some of the lots of Cosumnes do not ever go into the stock-books, if they go out di-

(Testimony of E. Clemens Horst.)

rectly they are not in the stock-book, and they do not go on this page of stock on hand. When hops are baled out and shipped without ever being held on the ranch, that is stock moved out right away.

Q. Show me where there was any other kind of hops that you had on hand November 4th, 1912.

A. Here are pages 58 and 59. It shows the entire stock and the dates they were given the lot numbers. On page 58 it shows the 2341 bales, and on page 59 it shows on the other ranch 2134 bales. Making a total of 4475 bales.

Q. When were those entries made?

A. At that time. There is a discrepancy of one bale in the record.

Q. Show me an entry as to where the other goods went out, other than the other goods you have given us here.

WITNESS.—I can give you this information as well as anybody else. Joseph Schlitz Brewing Company, 100, lot 542, on August 30th. That does not necessarily mean the day that it was shipped. It simply means the day we expected to ship them.

Mr. POWERS.—Q. What is the next entry?

A. The next is the same date, Joseph Schlitz, 100 bales, lot 453. [193] That is August 30th. On September 10th, to Schlitz, 100 bales. September 10th, Schlitz, another 100 bales. Lot 455 and 456. One bale lot 457. Same date, one bale, lot 458. Same date, 100 bales, lot 459. On September 14th, Schlitz, 100 bales, lot 501, on the same date 100 bales, lot 502. Same date, lot 502, 100 bales, 100 bales lot

(Testimony of E. Clemens Horst.)

503, 100 bales, lot 524, 100 bales, lot 505, September 23d Gottfried Brewing Company, Chicago, 100 bales, lot 463. September 30th Peter Barman, Kingston, 1 bale, lot 451. September 30th, Kenewah Brewing Company, Charleston, 5 bales, lot 451. September 30th, Kittaning Brewing Company.

A. (Continuing.) Kittaning Brewing Company, 5 bales, lot 451. October 4th, Wooster Brewing Company, 100 bales, lot 507. October 9th, Liebert, Philadelphia, 5 bales, lot 451. October 9th, Stanton, Troy, 4 bales, lot 451. October 12th, Graff, 1 bale, lot 454. October 12th, Hinkley, Philadelphia, 4 bales, lot 518. October 14th, Cook, Chicago, 10 bales, lot 454. October 14th, Gottfried, Chicago, 2 bales, lot 454. October 17th, Citizen, 5 bales, lot 454. October 17th Eastern Brooklyn, 20 bales, lot 451. October 17th, Florida, Tampa, 5 bales, lot 541. October 22d, Cambrinus, Chicago, 5 bales 454. October 22d, George, New York, 10 bales, lot 451. October 25th, Zoloski, 5 bales, lot 454. October 31st, Bayton, 100 bales, lot 466; 99 bales, lot 467; 100 bales, lot 468; 1 bale, lot 454. October 31st, United States Brewing Company, Chicago, 100 bales, lot 508. October 31st, United States Brewing Company, Chicago, 96 bales, lot 510. October 31st, George, New York, 1 bale, lot 451. October 31st, Kenawha, 25 bales lot 454. October 31st Bellair, 15 bales, lot 454. November 7th, Frostberg—

The COURT.—You do not want anything after November 4th?

Mr. POWERS.—Q. State where you shipped any

(Testimony of E. Clemens Horst.)

goods, where you have a record of shipping any goods that you had on hand, Cosumnes' goods, [194] that you had on hand November 4th, 1912?

The COURT.—I think that has all been gone into.

Mr. POWERS.—He testified from memory. I want to see the record of that.

A. Just continue with this. Frostberg, 2 bales, lot 451. Park, Providence, 1 bale, lot 451. November 8th, Gottfried, Chicago, 100 bales, lot 472; 10 bales, lot 476. November 9th, S. W. George, 1 bale, lot 451. November 11th, Eagle, Utica, 100 bales, lot 513. November 13th, Isengram, Troy, 5 bales, Park, Providence, 1 bale, lot 512. November 15th, Gutsch, 3 bales, lot 454. Same date, Pulerabeck, 1 bale, lot 460. Same date, Steil, 50 bales, lot 509. Same date, Crantz, 15 bales, lot 474. November 18th, Gottfried, 6 bales, lot 476. November 19th, Haffner, New York, 16 bales, lot 509. November 19th, Narragansett, Providence, 98 bales, lot 514. November 21st, Florida, Tampa, 10 bales, lot 451. November 22d, George, New York, 1 bale, 451. Same date, Bessemer, 5 bales, lot 454. November 23d, Springfield, *Springfield*, 98 bales, lot 506. November 23d, Rothacker, 25 bales, lot 512. November 25th, 1 bale, lot 451. Same date, Park, Providence, 20 bales, lot 451. 25th, Megowan, 5 bales, lot 512. Same date, Narragansett, 2 bales, lot 509. Same date, George, 10 bales, lot 512. November 26th, Megina, 3 bales, lot 451; 2 bales, lot 512. Same date, Cook, 10 bales, lot 460. November 29th, Eastern Brooklyn, 20 bales, lot 512. Same date, Boston Beer, 50 bales, lot 515.

(Testimony of E. Clemens Horst.)

Same date, Bessemer, Chicago, 5 bales, lot 454. November 29th, Haffner, New York, 9 bales, lot 509, George, New York, 25 bales, lot 465. December 16th, Centerville, Cleveland, 6 bales, lot 460. Same date, Henderson, 20 bales, lot 416. Same date, United States Brewing Company, Chicago, 100 bales, lot 516. December 18th, Kuhlman, 10 bales, lot 512. December 18th, Megina, 15 bales, lot 512. December 18th, Shainhossen, 1 bale, lot 454. December 20th, George, 2 [195] bales, lot 512. Same date, Consumers, 1 bale, lot 451. December 24th, Consumers, 3 bales, lot 454. And one bale lot 460. December 24th, Jefferson, 4 bales, lot 460. December 30th, Lauer, Redding, 4 bales, lot 515. January 7th, Silverton, 6 bales, lot 460. January 7th, Centerville, 10 bales, lot 460. January 10th, Aurora, 85 bales, lot 461. January 13th, Bayton, 1 bale, lot 454. January 15th, Atz, 6 bales, lot 473. Same date, Frostberg, 3 bales, lot 473, 17th, Staemele, 2 bales, lot 460. January 17th, Cleveland, Sandusky, 91 bales, lot 520; 6 bales, lot 524. January 18th, Steiner, 33 bales, lot 519. January 18th, United States Brewing Company, 100 bales, lot 464; January 20th, United States Brewing Company, 59 bales, lot 520; 41 bales, lot 519. January 20th, Cream City, Milwaukee, 75 bales, lot 465. January 23d, Steiner, 91 bales, lot 473. January 25th, Werner, 1 bale, lot 460. Same date, Menasha, 1 bale, lot 460. 29th, Smith, 42 bales, lot 522. 31, Mobile, 15 bales, lot 461; 5 bales, lot 462. 31st Haffner, 91 bales, lot 517; 1 bale, lot 460. February 5th, Cook, 15 bales, lot

(Testimony of E. Clemens Horst.)

462. February 8th, Cream City, 80 bales, lot 462. February 11th, Frostberg, 8 bales, lot 517. 20, Smith, 25 bales, lot 470. 28th, Manhattan, 30 bales, lot 460. Same date, same parties, 10 bales, lot 454. 28th, Lauer, Redding, 1 bale, lot 515. March 4th, Altoona, 10 bales, lot 474; 5 bales, lot 524. March 4th, Yale, New Haven, 35 bales, lot 524. March 10th, Jacks, 15 bales, lot 518; 14 bales, lot 521; 3 bales, lot 525; 1 bale, lot 475; 2 bales, lot 476; 14 bales, lot 511; 12 bales, lot 474; 4 bales, lot 518. March 11th, Johnson, 25 bales, lot 407. March 13th, Allegiers, 2 bales, lot 417. March 14th, Cataract, 10 bales, lot 470; same date, Hopkins, 2 bales, lot 515. March 19th, Bauer, Schweitzer, 5 bales, lot 476; same date, McHenry, 1 bale, lot 460. March 31st, Centerville, 5 bales, lot 460. Same date, 1 bale, lot 519. March 31st, Herman, 71 bales, lot 475; 10 bales, lot 471. April 9th, Husting, 1 bale, lot 519. [196] April 18th, Hupsel, 38 bales, lot 470. April 30th, Vogel, 1 bale, lot 519. May 12th, Atlas, 2 bales, lot 519. May 15th, Atlas, 1 bale, lot 416. May 23d, Gamble, 5 bales, lot 511. 28th, Atlantic City, 10 bales, lot 526. June 17th, Likens, 8 bales, lot 525, July 9th, Stoudsberg, 5 bales, lot 525. July 10th, Yale, 2 bales, lot 521; 1 bale, lot 518. That is all.

Q. From November 4th, to the end of that season how many bales in all did you handle?

A. I would have to pick out the New York and Chicago offices. This includes all of the business. Includes the San Francisco business. The New York office did not know any more about the San

(Testimony of E. Clemens Horst.)

Francisco office than we told them. We sold the San Francisco goods in every way we could. We have certain goods on hand that we shipped out at approximate dates. November 4th on, these are approximate dates. The total amount of goods is shown by the book. The hops would be in our hands long after these dates, that I have given you.

Q. On November 4th, what was on hand?

A. Well, I do not know exactly just what hops you are referring to.

A. During the period from November 4th, 1912, to July 1st, 1913, the *shops* referred to in the book under the title "U. S. Buyers," were on hand and shipped out by your San Francisco office, were they not?

A. Those are the dates that the entries were put on the book.

The COURT.—What do you mean by the approximate dates?

A. These are the dates when the entries are made.

Q. When is the entry made,—in the order received?

A. When we hear of a shipment being moved, a lot of hops being moved, from one ranch to the buyer, or any hops being shipped to a buyer, then we enter it up of that date, as of that date. Many of these lots there will be entered up as of a certain date, and they will be on hand after that. [197]

The COURT.—Before they are actually shipped?

A. Yes.

Mr. POWERS.—(Q.) These goods referred to

(Testimony of E. Clemens Horst.)

were ultimately shipped to these various purchasers?

A. These goods were shipped to these various purchasers.

Q. That business was in the hands of Horst Company during November 4th, 1912, to July 1st, 1913, was it not?

A. That was business being handled by the San Francisco office. The total number of bales we sold from the San Francisco office. The difference between 19,979 bales and 8,462 bales approximately 10,500 bales was what we had on hand November 4th, 1912. All goods raised in the Cosumnes ranch are in that book.

Q. What bales of Cosumnes hops had you then already set aside to contracts then in existence?

Mr. DEVLIN.—I object to that. He uses the words "set aside." Counsel all along seems to be of the opinion that we have to take 2,000 bales and set them aside. I object to the question as irrelevant, incompetent and immaterial.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #67.

Q. Will you give me the deliveries and dates of delivery of Cosumnes goods that you made on your contracts which were in existence at the time of the commencement of the season in 1912?

Mr. DEVLIN.—He has already testified to that and gone over that in cross-examination.

The COURT.—Objection sustained.

(Testimony of E. Clemens Horst.)

Mr. POWERS.—Exception.

Exception #68.

A. We had no sales to anybody else of air-dried Cosumnes hops except the one sale to Pabst of 2,000 bales.

Witness continues: There were no other sales for Cosumnes hops.

Q. What became of the remainder of the 3,062 bales you had on [198] hand on November 4th, 1912, after selling the 2000 bales on account of Pabst.

A. There were 150 bales or something like that of clean-ups and the balance were used by us for deliveries on prior sales of choice Pacific Coast hops.

The COURT.—He has said that before.

Mr. POWERS.—I want to get the price for which these were sold.

The COURT.—I think that is immaterial to this case.

Our claim is made up as follows: We took all of the sales of Cosumnes river hops that we made, exclusive of the clean-ups, after November 4th. That made 1500 bales, or a little over. That made a certain average price. Instead of putting the balance of the hops to make the 2000 at that same average price, we put them in at the higher average price, being the lowest sales on the contracts. We had contract deliveries for a large quantity of hops. We had advance contracts for 20 or 30 thousand bales of hops, of Pacific Coast hops, but the average of the 1500 bales made a certain figure. The 1500 bales that we sold subsequent to November 4th. So in-

(Testimony of E. Clemens Horst.)

stead of putting on 500 bales, on the average of the 1500 bales, I put on those 500 bales at a price higher than the average was, so that there could be no question about the amount of damages.

Q. You mean that you allowed a higher average price?

A. Yes, than for the 500 bales, as against the 1500 bales that was sold.

Mr. POWERS.—I move to strike out the testimony of the witness just given on the ground that it does not appear that any portion of these 3062 bales were in any designated as Pabst goods, or as being used by him for the purpose of completing the Pabst contract, and because in addition thereto, there was certain other goods that were sold, that were available to be used by [199] him for fulfilling the Pabst contract at an entirely different price than that given by him, and we have not the evidence of that.

The COURT.—The motion is denied.

Mr. POWERS.—Exception.

Exception #69.

Q. If you will give me a list of the hops that were made to fill the contracts that you then had in existence, I will be obliged to you.

A. I will pick that out for you.

Q. What reshipments were made by you of Cosumnes air-dried hops after they left the coast?

A. I will pick that out for you from the book.

Amongst the original vouchers of the New York and Chicago offices are the following (here insert

(Testimony of E. Clemens Horst.)

such charges as shall be selected by the attorneys for plaintiff and defendant, as being proper charges).

Q. Were these contracts that were filled with Cosumnes hops, air dried, of the crop of 1912, not included in the 497 bales, *filed* before November 4th, 1912, or after November 4th, 1912?

A. There were some contracts filled before November 4th, 1912, and some were filed after November 4th, 1912.

Q. Will you give me the list of such of them as were filled by Cosumnes hops prior to November 4th, 1912? A. Yes.

Q. I want the dates and the amounts.

A. All right.

Redirect Examination by Mr. DEVLIN.

Q. What was the market price at the nearest available market for choice, air-dried Cosumnes hops in the month of February, 1913?

A. Between 10 and 12 cents per pound in that quantity.

Mr. POWERS.—(Q.) What was the market price at that same nearest available market for choice Cosumnes hops at that time? [200]

A. You would have a wider range of buyers if you were buying the choice Cosumnes without the air dried, because there would not have been the stigma, or the bad reputation resulting from their rejection.

Q. So far as the hops themselves were concerned, they sold by samples, and the buyers would not know the difference?

A. The buyers know everything. As soon as a lot

(Testimony of E. Clemens Horst.)

of hops are rejected, it is well known from one end of the country to the other.

Q. You say they were sold from 10 to 12 cents. On what do you base your figure?

A. I base it on the quantity of hops and the market conditions, and the fact that the next crop, which would be worth more money, was then selling at 12½ cents. There is no nearest available market. You have got to sell them wherever you can sell them, wherever you can sell them.

Q. Suppose you cut the quantity into ten lots of one hundred?

The COURT.—That has all been gone over time and time again. I cannot allow you to go into that sort of repetition.

Mr. POWERS.—Exception.

Exception #70.

[Testimony of E. A. Zipfel, for Plaintiff.]

E. A. ZIPFEL, called, sworn, testified as follows:

Direct Examination by Mr. DEVLIN.

I am a hop inspector and hop buyer, and at present am working for plaintiff and have been called upon to grade hops, to determine their quality. I have been engaged in that business for about twelve years. Hops have been bought on my judgment, after inspection. I am familiar with hops grown by Mr. Horst. I attend to the making of shipments for him. Choice hops are the best average quality of any particular Section. Choice hops of the Cosumnes District are the best average quality of that

(Testimony of E. A. Zipfel.)

district. There is a distinction between air drying and kiln drying. I [201] have examined samples 1 to 20 and 25 to 38. They were choice hops. I am familiar with the hops that were raised on the ranch of plaintiff. We have certain lot numbers for so many bales. Merely as a matter of record. Plaintiff has several ranches and we give certain lot numbers to each ranch. For our own convenience in designating hops, we put 100 bales in a lot in general. In that way we give a lot number and I can tell from which ranch the hops come, and these lot numbers are carried through our books. I saw the hops that the samples here shown were taken from. As an expert after a hop is two years old I cannot tell the condition so far as lupulin and fatness is concerned and the aroma. I am familiar with the splits of samples kept by plaintiff in this case. The other split was forwarded to the Pabst Company and at that time the condition of the hop was choice. They were cleanly picked, as that term is understood by the trade. There is no such thing as an absolutely clean picked hop.

Cross-examination by Mr. POWERS.

I never graded hops for anyone else except Mr. Horst. All my experience with hops has been with the Horst concern. I bought other hops than Horst hops.

The COURT.—He said that he graded hops for Mr. Horst's purchases. With reference to the samples that were forwarded they were fairly clean hops. They were what I would call choice hops. They

(Deposition of E. A. Zipfel.)

were cleanly picked. They were all in one grade, but they were not identically the same kind. I saw samples 21 to 24. Some of them were Cosumnes hops. These samples were not fresh samples when I saw them first. I did not compare them with the other samples when they were first received, but a short time afterwards, I think they were Cosumnes hops. [202]

[Testimony of E. Clemens Horst, for Plaintiff (Recalled)].

E. CLEMENS HORST recalled for direct examination by Mr. DEVLIN.

If we had not had on hand the 1500 bales out of the 2,000 sold to Pabst our overhead expense in New York and Chicago would have been less. The men employed there would have been sent into other territories, like over to England or over to Canada, to sell these hops.

Q. How much do you estimate that the overhead expenses were increased by the fact that you had to sell through agents in Chicago this 1500 bales of so-called Pabst hops?

Mr. POWERS.—That is objected to as irrelevant, incompetent and immaterial, and argumentative.

Exception #71.

A. About four or five thousand dollars.

Cross-examination by Mr. POWERS.

The list of sales that went through the New York office were compiled from our San Francisco books.

Q. What record shows that the Cantiler Brewing

(Deposition of E. Clemens Horst.)

Company bought 20 bales through the New York office?

A. Those are the sales not only in New York, but New York, Chicago, San Francisco and all other places. The New York office did not have sales sheets. We do not keep any New York books. This record is made from communications that come here from the New York office. On November 4th, 1912, there were 1061 bales on the ranch; and 169 bales on the ranch, 400 bales at Milwaukee, 440 bales at New York; 639 bales in Chicago; 345 bales en route to the east, making 3,062 bales.

Q. I want a record of prices obtained by you for all of these 3,062 bales that you had on hand on November 4th, 1912. You have given us 2,000 bales. Will you kindly give us what the remaining 1062 bales sold for? [203]

Mr. DEVLIN.—I will object to that as irrelevant, incompetent and immaterial.

The COURT.—I am not prepared to say that it is not proper cross-examination. If I understand Mr. Powers' theory, it is; if certain of this quality of hops, 3,062 bales, were sold at a higher figure than those that were charged to the Pabst sales, he will argue that they have as much right to the credit of those higher sales as the plaintiff has to charge them against Pabst. Is that right, Mr. Powers?

Mr. POWERS.—Yes.

Mr. DEVLIN.—May I ask a question to clear that up?

The COURT.—You may, yes.

(Deposition of E. Clemens Horst.)

Mr. DEVLIN.—After November 4th, 1912, how many bales of these hops that you call choice air-dried Cosumnes hops, did you sell?

A. 1503 bales. In my statement I gave Pabst credit for some 500 bales that were sold on prior contracts. I figured up the contract both ways.

Q. Were the prices that you gave him credit for on those prior contracts higher than the prices you paid for the 1500 bales after November 4th?

A. I figured it up both ways. I figured it up on the basis of the same average, and on the basis of the higher average, for the 500 bales. The other 1062 bales were delivered on contracts on which we already had a profit because of decline in the market on November 4th.

Mr. POWERS.—(Q.) Were those sales of the 1062 bales made before November 4th, 1912?

A. Yes.

Q. So that you did not have at your command 1062 bales; they were not in your possession. They were not at your command because they had already been sold?

A. Why, no we had made sales, but we could have used the other [204] hops, or not used them as we pleased.

Q. What allotment had been made to these various contracts when the Pabst contract was breached, according to your theory, November 4th, 1912. Kindly give us the amount that the 1062 bales finally sold for.

The COURT.—They were delivered after Novem-

(Deposition of E. Clemens Horst.)

ber 4th, under a prior contract.

WITNESS.—Yes. I will have to make up that statement for you. I will be pleased to make it up for you.

WITNESS.—I do not like all of my private business known to the competitors.

Mr. DEVLIN.—What Mr. Powers is asking for is entirely immaterial to this case.

The COURT.—The only question is whether or not as a matter of cross-examination he has a right to inquire into the disposition of all this quantity of hops. They are not bound to take the direct examination of the witness.

Mr. DEVLIN.—If they want to contradict Mr. Horst on that they may do that, but the idea of assuming that there were 1000 bales outside of the 2,000 bales on prior contracts, that were delivered after November 4th and not sold prior to that time is immaterial to this case.

The COURT.—They had outstanding certain prior contracts, perhaps not prior in date to the Pabst contract, but contracts for the delivery of hops characterized as Choice Pacific Coast hops. They were required to fill on those hops, but what they called for was a character of hop which were just as available for that purpose as for any other. When the breach of the Pabst contract came on it left upon their hands enough hops to comply with those contracts in excess of the 1500 bales they had disposed of in accordance with their efforts to get rid of the quantity left on their hands by Pabst, whereas, if

(Deposition of E. Clemens Horst.)

the Pabst contract had been carried [205] out, and they had been called upon to appropriate the full 2,000 bales of Cosumnes hops to that contract, they could have gone into the open market of Pacific Coast hops and got enough to fill those contracts. It was only because they had these hops on their hands that they resorted to them for the purpose of filling these prior contracts. In any respect how is it material to you what price was obtained on these other contracts?

Mr. POWERS.—We have a right on cross-examination to know how the record—

The COURT.—You have no right to bring out anything that does not tend to enlighten the jury as to the correctness of the statements of the witness.

Mr. POWERS.—If we can show that he did not have enough hops on hand to fill those orders, then I would have a right to treat the sales made by him of those hops as a part of the Pabst deal.

The COURT.—I do not think so.

Mr. POWER'S.—We will except to your Honor's ruling.

The COURT.—If that is your theory the objection will be sustained.

Mr. POWERS.—Exception.

Exception #72.

Q. You were to look up and see whether there was any reduction in price to these breweries because of a rejection of Cosumnes hops in 1912, did you do so?

A. I have not been able to get at that yet.

Q. I would like to have you do so before I close my case.

(Deposition of E. Clemens Horst.)

Mr. DEVLIN.—That is entirely immaterial, because the only contract Mr. Horst testified he had for choice air-dried Cosumnes hops was this Pabst contract.

Mr. POWERS.—I will follow it up by the admission on the part of Mr. Horst that they were not choice because of these rejections.

The COURT.—I will sustain the objection.

Mr. POWERS.—Exception. [206]

Exception #73.

The following witness was called, sworn and examined on behalf of defendant.

[Testimony of Irving S. Marks, for Defendant.]

IRVING S. MARKS, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop buyer and grower. Have been in business for sixteen years near Sacramento. Buy throughout Sacramento Valley and in Sonoma for the sale in the United States market. I am familiar with hops commonly called Cosumnes hops. I have seen samples of those grown by the plaintiff commonly called air-dried Cosumnes hops. I have examined samples 1 to 20. With reference to sample #11, I would call it a medium hop. I would grade it medium to prime. We recognize four grades—common, prime, medium and choice. There is a grade known as fancy, but it is seldom used. Prime comes after choice in the downward grade, then medium.

Q. With reference to this sample #11, why is it not choice?

(Testimony of Irving S. Marks.)

A. It is not well picked. It is what we call a dirty pick.

Q. Can you show the indications of that dirty pick in such a way that a person not an expert can see them?

A. Yes, anybody can see the leaves or stems.

Q. Just put the samples down there if you will. Show a leaf and a stem so the jury can see it.

A. The leaves are here and the stems are not so prominent. The leaves are the most prominent.

The COURT.—Do not talk to the jury unless you are testifying from the witness-stand.

Mr. POWERS.—(Q.) If it should appear that these samples were forwarded to Milwaukee from Sacramento in the latter part of October, 1912, then put in cold storage, taken out of cold storage once in the early part of March, and once in the latter part of March, 1913, and then again taken out of cold storage [207] in the early part of April, 1914, and brought out here by express could you still tell any of the qualifications of the samples with reference to their quality other than the clean picking?

A. You could tell all except the flavor.

Q. What are the requirements of a choice hop?

A. A choice hop must be cleanly picked, well and properly dried and cured, free from the defects of vermin damage, and good flavor and uniform color.

Q. What about the color of this sample as far as its uniformity is concerned?

A. They are not uniform. It would prevent it from being a choice hop, and it is badly picked. Its

(Testimony of Irving S. Marks.)

picking and lack of uniformity in color would be sufficient to grade it lower than choice. With reference to sample 31 shown me, it is very leafy and stemy and badly picked. It is not uniform in color. It would make a lower grade.

The COURT.—He has told you that, in that it was not a choice sample. I would not repeat the same thing about every sample. Just ask him whether it is choice or not.

Q. How would you grade this?

A. I would grade this medium to prime for the section that it was raised in.

Q. Kindly show the sample to the jury. (He does so.)

A. It is leafy and stemy and therefore a dirty pick. There are leaves and there are stems. Those leaves and stems are not usual in choice hops. It would prevent it from being a choice hop.

Q. With reference to sample 33, what is its quality?

A. It is also a dirty pick and not uniform in color. I would deem it medium to prime. With reference to sample 38, it is a very dirty pick.

(Witness shows to the jury where the dirt exists, indicating leaves and stems. This particular stem is unusually large.)

A. With reference to sample 22, it is somewhat leafy, but I would [208] call it a prime hop. It is better than samples 33 and 38. If sample 22 was the sample hop, samples 33 and 38 would not be considered commercially sufficient for delivery under

(Testimony of Irving S. Marks.)

that sample. I have examined samples 25 to 38 and I have also examined samples 21 to 24.

Q. Are samples 25 to 38 equal to the four samples 21 to 24.? A. They are not.

Q. Why not?

A. They are more dirty picked, not uniform in color.

Q. Examine samples 1 to 20 and ascertain their quality and compare with samples 21 to 24.

A. They are not equal in color.

Q. What is the difference between samples 1 to 20 and 25 to 38, if any?

A. I cannot see any particular difference. Sample 36 is only a slip off of a sample. It would not be considered a sample in the trade sufficient to make a trade upon. I know the conditions of the buying and selling market for choice air-dried Cosumnes hops in the *money* of November, 1912, in Sacraemnto County.

Q. During the month of November, 1912, what was the market for choice, air-dried Cosumnes hops?

A. There was no such distinction known to the trade as air-dried hops.

Q. What would be the reasonable market value of choice, air-dried Cosumnes hops at that time, dried in accordance with the process, whereby the drying was made by forcing air from the outside in through the hops?

The COURT.—Have you any knowledge as to the distinctive market value of that character of hops from any others? A. I have not.

(Testimony of Irving S. Marks.)

Mr. POWERS.—(Q.) You have seen certain samples of the Horst hops? A. Yes, sir.

Q. What would be the reasonable market value of a hop of the character of one to twenty if it were choice, in the month of [209] November, 1912?

Mr. DEVLIN.—The witness has not been shown to have sufficient knowledge to answer the question.

The COURT.—He has already told you that he did not regard these as choice hops. Whether these hops are choice or not is a pivotal question in this case.

Mr. POWERS.—I will show you now sample 21. What was the reasonable market value of hops of that character in November, 1912?

Mr. DEVLIN,—I object to that, your Honor, on the ground that is not one of the samples.

The COURT.—Objection sustained.

Q. What was the reasonable value of choice, air-dried Cosumnes hops dried under a process whereby the hot air is put into the kiln from the outside?

The COURT.—He has already answered that he does not know that there was any such distinction.

Mr. POWERS.—(Q.) What was the value of choice hops of that character dried in that manner in November, 1912?

Mr. DEVLIN.—That is assuming that he knows.

Mr. POWERS.—(Q.) If you know.

A. 17½ to 18 cents.

Q. How many bales would it take?

The COURT.—Could you have disposed on the market at that time of 2000 bales of Cosumnes hops at 17 to 18 cents?

(Testimony of Irving S. Marks.)

A. Within a time I could. It might have taken six weeks.

Q. Suppose you cut the price to 16½ cents, how long would it have taken you?

Mr. DEVLIN.—That is objected to as speculative and hypothetical.

The COURT.—It is not material here at all.

Mr. POWERS.—Exception.

Exception #75.

Q. Was the market in position at that time if the price of the [210] hops was cut down to 16 cents for the market to have taken 2000 bales, or not?

Mr. DEVLIN.—That is objected to as hypothetical and speculative.

The COURT.—Objection sustained.

Mr. POWERS.—Exception.

Exception #76.

Q. What was the reasonable value of the service of a broker in selling hops of that kind?

A. From a grower to a dealer one-half cent a pound. From a dealer to the brewer would be different. I had nothing to do with that on the coast. The price given by me to a grower must have a half a cent added to it as the price to a dealer.

Cross-examination by Mr. DEVLIN.

I have resided in Sacramento for two and a half years. Before that I resided in Santa Rosa, and was working for Messrs. Uhlman & Co. I am now in business for myself. Have been in business for about a year and a half, buying hops for eastern hop merchants and commission dealers. I bought for

(Testimony of Irving S. Marks.)

several firms in Cincinnati, New York and St. Louis and I buy on commission. They wire us orders and we execute the orders. We go out and see if we can get the hops for that price named. I do not buy on my own account. We buy from various growers in this section, as well as in Sonoma. I cannot remember buying any hops of the Cosumnes crop in 1912, although I had offers on hops of that crop. I had orders to buy them. I examined thousands of bales including hops grown by Jacks, Kennedy, Murphy and Grimshaw. I do not think any of these hops were choice. I saw one lot of hops in a sample that were choice of that year. They were from Mr. Mayon's. I did not examine the bale. Only the sample. I do not remember of seeing other Cosumnes crop of 1912 that were choice. I examined several thousand bales. I was not located here in 1911. I saw [211] some hops of the 1911 crop, but I cannot remember the details of that. I would call Grimshaw's hops prime. They are better than the samples which are shown here. I would not say that any of the Grimshaw hops were worse than the samples shown me. Some of the Grimshaw hops were better, but even then they were not choice. Mr. Kennedy's were like to Grimshaw's. I have grown hops in Yuba County for the past two years. Seventeen acres. I have done some growing of hops, very little. I have done some of it myself about a year ago. I did not know any difference between air dried and kiln dried. I have never heard of any such distinction. I have heard that there was such a process, but I never heard

(Testimony of Irving S. Marks.)

any distinction being made either way. I never examined the process for air drying as distinguished from kiln drying. I never saw the air drying process in my life, nor made a scientific study of hops. What I know about hops is buying, selling and growing them. If 5000 bales of hops were grown on one ranch I would not expect them to all be alike. They would vary some, but it would be hardly likely that they would all be choice hops. Some of them would fall below that quality. I would not think that one sample would be a fair indication of what the balance of the 5000 bales were as to color, lupulin and everything else. A choice hop must be cured properly, and must be uniform in color. It must be healthy and must not be picked immaturity. It must be cleanly picked and not too many leaves. Cured properly and baled properly. We depend a great deal upon sight in determining whether a hop is choice or not. Also by flavor. After two years' time you cannot depend upon the flavor. Other experts differ with me sometimes on minor points. We do not specify hops as to the number of points. It is hardly a matter of experience in judging hops from their appearance. Crops like Mr. Mayon's [212] and Mr. Jacks' last season would grade as high as Russian River. That is they sell for a little higher price. I examined samples of Mr. Mayon's hops in our office in Santa Rosa. We got them from our agent in Sacramento, Mr. Otto J. Cook. I have an office with only one man with me. Myself and partner. During the busy season we have a stenog-

(Testimony of Irving S. Marks.)

rapher. We keep our office open all through the year. If hops were put into our hands to sell, we went out and got solicitors and keep the office open. We only charge a cent and a half a pound for selling them.

Q. Suppose I should put 2000 bales of rejected hops in your hands at the close of the season in November, 1912, that were rejected by a large brewery in the east, and you had to employ men in New York, Milwaukee and Chicago to sell some of them, and you had to hire solicitors, would you only pay them one-half a cent a pound?

Mr. POWERS.—We object to that as putting in certain elements that are conclusions of law, and not necessarily facts.

The COURT.—Objection overruled.

Mr. POWERS.—Exception.

Exception #77.

I do not know what the charge would be. It would be more than half a cent a pound. I could not say it would be 2 cents. There is no such thing as a perfectly clean hop. There are more or less leaves in them. It is a matter of experience and judgment in the business of deciding what quantity of leaves would be permitted and the hops to be classed as choice. We do not rely on percentage at all. We have no standard as to the quantity of leaves. We know by experience. You cannot set any particular line to draw because such a question has never come up. You judge from the appearance of the hops themselves. I have no standard that I can define. It is a matter of judgment gained from experience.

(Testimony of Irving S. Marks.)

In that way it is arbitrary judgment. I have seen some [213] of Mr. Horst's air-dried hops. The samples here and other samples that I have been told were air dried. If other samples had been substituted I would not have known whether they were air dried or not. It is impossible to tell the condition of those hops so far as flavor is concerned, but so far as the lupulin, you could tell. The oily substance in the lupulin evaporates, but the resinous substance remains in the hop. The oil leaves the hop upon exposure.

Redirect Examination by Mr. POWERS.

Mr. POWERS.—I show you samples 21 and 22 and ask you as to the relative value of those two samples?

A. I do not know as I can pass up on them in this light. I cannot see any difference in those samples as far as their relative value is concerned. This sample is pretty badly broken up now.

Q. What sample is that?

A. Number 25. This is one here. It has been badly handled and it is hard to determine anything about it. If I had 2000 bales of choice hops in November, 1912, to sell, I would secure a large line of samples, and distribute them throughout the United States with the different eastern houses and in my opinion it would probably take six weeks to sell them in that way.

Q. Does a choice hop mean the best average hop in a district, or what does it mean?

The COURT.—That has all been gone over.

(Testimony of Irving S. Marks.)

Mr. POWERS.—This is in rebuttal of their witnesses.

The COURT.—You have gone all over that.

Mr. POWERS.—I will save my exception.

[Testimony of C. C. Sweeney, for Defendant.]

C. C. SWEENEY, sworn, testified as follows:

Direct Examination by Mr. POWERS.

I am a hop merchant and have been connected with the hop business for thirty years, buying hops, selling hops, inspecting [214] hops and selling to brewers. I am familiar with the services of brokers and others dealing in the sale of hops from actual experience. I consider myself an expert in the line of passing upon grades of hops and examining hops and upon the services of men employed to sell hops. The only way I know the difference between an air dried and a kiln dried is to look at the hops in the bale or by sample. I am familiar with the process of drying hops known as air dried. I worked in the first air-blast furnace that was ever used in the west. The term “air dried” refers to all hops. They are all air dried. The hot air ascends. It is applied in the drying room by a stove or otherwise.

Q. Is there any other process of drying hops than by air?

A. Some hops are partially dried in the sun. There is no other method of curing hops except by drying them by air applied by a furnace. The term “air dried” hop in a contract has no significance.